No. 73

JOINT APPENDIX

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,027

ISBRANDTSEN COMPANY, INC., *Petitioner*,

v.

UNITED STATES OF AMERICA, AND FEDERAL MARITIME BOARD,
Respondents,

JAPAN-ATLANTIC-AND GULF FREIGHT CONFERENCE, ET AL.,
Respondent-Intervenors,

THE SECRETARY OF AGRICULTURE, *Petitioner-Intervenor*.

Petition for Review of Order of the Federal Maritime Board

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Petition for Review of Order of the Federal Maritime Board

JOINT APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed December 19, 1955]

Joseph W. Stewart, *Clerk*

ISBRANDTSEN COMPANY, INC.,
Petitioner,

v. No. 13027

UNITED STATES OF AMERICA, and
FEDERAL MARITIME BOARD,
Respondents.

Petition to Review

1. This petition is filed and the jurisdiction of this Court is invoked pursuant to the provisions of the Shipping Act of 1916, as amended, 46 U.S.C. 830, the Act of December 29, 1950, commonly known as the Hobbs Act, 5 U.S.C. 1031 et seq., and the Administrative Procedure Act of 1946, 5 U.S.C. 1009, to review, enjoin, set aside, annul and suspend the report, and approval therein, of the Federal Maritime Board (hereinafter sometimes referred to as the "Board"), dated December 12, 1955, served on the public December 14, 1955 (a copy of the Board report dated December 14, 1955, is attached hereto as Exhibit A). Said Board report and approval purport to authorize the Japan-Atlantic and Gulf Freight Conference (hereinafter sometimes referred to as the "Conference") to employ the so-called exclusive patronage contract dual rate system effective January 1, 1956, thereby permitting the Conference to coerce shippers in the trade to patronize conference steamship lines exclusively and to retaliate against those shippers in the trade who would patronize petitioner.

2. Petitioner, Isbrandtsen Company, Inc., is a "citizen of the United States" witkin the meaning of Section 2 of the Shipping Act 1916, as amended, 46 U.S.C. 802, operating

as a common carrier by water in the foreign commerce of the United States on various trade routes, particularly in the freight trade from Japan, Korea and Okinawa to United States North Atlantic Coast ports. Petitioner operates in the freight trade from Japan, Korea and Okinawa to the North Atlantic Coast of the United States as a part of its Eastbound Round-the-World Service, on a regularly scheduled basis, making a sailing every two weeks, using United States-flag vessels exclusively.

3. Petitioner is a corporation organized under the laws of the State of New York and is a resident of that State maintaining its principal office and place of business at 26 Broadway, New York 4, New York.

4. The United States of America is made a respondent herein pursuant to Section 1034 of Title 5 of the United States Code. The Federal Maritime Board is made a respondent pursuant to Rule 38(a) of this Court.

5. The Japan-Atlantic and Gulf Freight Conference is a voluntary association of seventeen common carrier steamship lines, with its principal office in Japan, which maintains an agent and has a place of business at 11 Broadway, New York, New York. The Conference is composed of twelve foreign-flag lines (eight of which are Japanese) and five United States-flag lines. Insofar as they are active in the trade, each conference line operates as a common carrir by water in the transportation of property between ports in Japan, Korea and Okinawa and ports on the Gulf and/or Atlantic Coasts of North America. Since the vessels of each member line of the Conference regularly call at United States ports for the loading and discharging of cargo, the conference lines are subject to the jurisdiction of the laws of the United States. Although nominally there are five United States-flag members of the Conference, two are virtually inactive in the trade having carried practically no cargo from Japan, Korea or Okinawa to United States Gulf or Atlantic Coast ports at least since 1949. Another

United States-flag line operates from Japan only to Gulf ports of the United States. One American-flag conference member does not even have voting privileges in the Conference.

6. Petitioner is the only independent, non-conference liner operation in this trade and has been since the end of the Second World War. Petitioner operates from Japan, Korea and Okinawa only to North Atlantic Coast ports of the United States competing directly for the cargoes which it carries with the twelve foreign-flag members of the Conference and with two United States-flag members who have actively engaged in this service to the North Atlantic Coast of the United States.

7. The Conference and member lines thereof purport to act in concert and to operate pursuant to a conference agreement, FMB No. 3103, first approved by a predecessor agency of the Federal Maritime Board in 1934. This basic agreement permits the establishment and fixing of uniform rates as between the conference lines, but it has never contained language specifically authorizing, or purporting to authorize, the use of the exclusive patronage contract rate system. Notwithstanding this lack of approval by the Board of its predecessors, the Conference employed the dual rate system illegally from 1928 to 1941 and was thereby able to eliminate or suppress any independent or non-conference competition.

8. Contrary to the specific provisions of Sections 14, 15, 16 and 17 of the Shipping Act of 1916, as amended, 46 U.S.C. 812, 814, 815, 816, prohibiting, among other things, "deferred rebates", "fighting ships", retaliatory, discriminatory or unfair practices, or practices detrimental to the Commerce of the United States, the Board's report of December 12, 1955, purports to authorize the institution of an exclusive patronage contract rate system by the Conference, effective January 1, 1956, whereunder the Conference would maintain two levels of rates, viz., the "contract

rates" and the higher "non-contract rates," the sole consideration for the enjoyment of the lower contract rates being the agreement of the shipper to patronize the conference lines exclusively, and the sole reason for the exaction of the higher contract rates being the refusal of the non-contract shippers to sign exclusive patronage contracts with the Conference. The non-contract rates as proposed by the Conference, and as approved by the Board, would be arbitrarily fixed at a level 9½ per cent higher than the contract rates. Although the Conference has not determined what rates it would establish under the exclusive patronage system, and, therefore, the Board had no specific rates before it in approving the system, both the contract rates and the non-contract rates would be charged for precisely the same transportation service, there being no difference in cost or value, or in any other respect, between the service offered contract shippers and that offered non-contract shippers. In order further to coerce the shippers and to effectuate a complete and permanent monopoly in the trade, the exclusive patronage contract, as approved by the Board, provides that in the event that a contract shipper should patronize a non-conference vessel operating in the trade, the shipper would become liable to a penalty of 50 per cent of the freight which he would have paid at conference contract rates had the shipment moved on a conference line. This entire system is intended to crush and eliminate the independent competition of petitioner, thereby allowing the Conference to enjoy a complete and perpetual monopoly in the trade and to charge such rates as the conference lines may wish.

9. The economic coercion of the Conference is further aided by the fact that the conference lines collectively furnish over 300 sailings a year as compared with only 26 sailings yearly by petitioner. Many shippers in the trade require eight or more sailings each month. Certain conference lines also furnish certain special facilities, such as refrigerated space and silk rooms, which Isbrandtsen does

not provide. Furthermore, Isbrandtsen does not serve certain ports, such as Gulf ports, which the conference lines serve. Shippers who would have to rely on Conference vessels for part of their service would be economically coerced into signing exclusive patronage contracts with the Conference and would be prevented from patronizing or using the service of petitioner.

10. The background of the administrative proceedings as to which review is sought is as follows:

a. The proceedings were started by the Conference filing under General Order 76, Rule 236, of the Federal Maritime Board, notice of the filing of which rule was given in the *Federal Register* of December 31, 1952. (A copy of Rule 236 of the Board's General Order 76 is hereto attached as Exhibit B.) Rule 236 of the Board's General Order 76 pertains to the employment of the exclusive patronage system by steamship conferences, often called shipping cartels, operating in the foreign commerce of the United States, which conferences can only lawfully exist when their concerted activities have been approved by the Board pursuant to Section 15 of the Shipping Act of 1916, as amended, 46 U.S.C. 814. (Copies of the pertinent sections of the Shipping Act, Sections 14, 15, 16 and 17 are hereto attached as Exhibit C.) The Conference filing under General Order 76 did not constitute, as the Conference admits, notice of any precise agreement between conference lines, but only the intention to institute an exclusive patronage system. This filing also contained an exclusive patronage contract which would be entered into between conference lines and shippers. (A copy of this exclusive patronage contract is attached hereto as Exhibit D.)

b. Of the about one hundred seventeen steamship freight conferences organized pursuant to Section 15 of the Shipping Act, and subject to the jurisdiction of the Board, about sixty-two conferences presently employ that system, through so-called exclusive patronage agreements or mer-

chants' rate agreements, under which a signing shipper obligates himself to transport all of his goods exclusively on the steamship lines which are members of the particular Conference and not to deal with any line which does not belong to the Conference, under severe penalties if he should violate said agreement. In sole consideration of the contract shipper's agreement of exclusive patronage to conference member lines, the "contract" shipper is charged a freight rate which is arbitrarily less by a fixed percentage or dollar amount than the rate charged the non-signing shipper. Such a difference in rates is called by the Conference a spread or differential.

c. In this trade—and in others—petitioner is not a member of the Conference, and is, in fact, in this trade—and some others—the only independent non-conference operator. In petitioner's operations around the world it is the largest American independent line.

d. In 1948, petitioner brought an action before a statutory court in the Southern District of New York to test the legality of the exclusive patronage contract rate system. After that court had issued injunctions against the use of the system in the North Atlantic trade, the proceeding reverted to the then United States Maritime Commission for the exercise of its primary jurisdiction. On appeal to the court by petitioner and the United States Department of Justice, from the order of the Commission which would have allowed the system to go into effect in that trade it was set aside by the statutory court, which decision was affirmed by the United States Supreme Court, by an equally divided court.

e. Since 1948 Isbrandtsen has been at all times ready and willing to have the basic issue of legality of the exclusive patronage system determined by the Courts and has been willing to reduce a stipulation of the issues to a few elemental and admitted facts. Because of the insistence of the Board, and its predecessors, that jurisdiction be exer-

cised in each case that arose, as in this particular proceeding, petitioner has been prevented, to this time, from obtaining a clear-cut court determination of the issue. It is this determination that petitioner now seeks. The same position has been taken over the years by the United States Departments of Justice and Agriculture.

f. Admittedly, as a result of the holding of District Court in 1951 concerning the attempted employment of the system in the North Atlantic trade, the Board promulgated its General Order 76, which in substance requires any conference which proposes to initiate such a system, to first file with the Board a statement setting forth the particulars as to the amount of the spread, the date when the system is to go into effect, the reasons for the use of the system in the particular trade, together with the filings of any contracts to be entered into by the conference or its member lines and shippers. Said General Order does not and has never required a statement of the nature or scope of the agreement between the conference lines.

g. The instant proceeding arises directly from such a filing on December 4, 1952, by the Japan-Atlantic and Gulf Freight Conference, proposing to initiate the exclusive patronage system in the conference trade effective on the thirtieth (30th) day following the filing. Protests against the proposed system were filed by petitioner and the Department of Justice, and subsequently by the Department of Agriculture. The summary of administrative proceedings and actions and the brief details of the appeals by petitioner and the Department of Justice to this Court, together with a statement of the Court orders are set forth on pages 2 and 3 of the Board's mimeographed report as follows:

"As required by General Order 76, the conference statement set forth (a) the amount of differential or spread between the proposed contract and non-contract rates, (b) the effective date of the proposed system, (c) the reasons for the use of dual rates in the trade involved, (d) the basis

or the differential or spread, and (e) copies of the form of contract proposed to be used.

"In its protests of January 12, 1953 to the conference statement, Isbrandtsen requested that we (1) grant a hearing on the lawfulness of the proposed dual rate system under sections 14, 15, 16 and 17 of the Shipping Act, 1916 (the act); (2) direct the conference not to effectuate the proposed dual rate system pending completion of the hearing, and alternatively (3) reject the conference statement, without a hearing, for non-compliance with General Order 76. In its supplemental and amendatory comments of January 19, 1953, Isbrandtsen argued that (1) it would be unlawful, under section 15 of the act, for the conference to initiate a dual rate system without prior Board approval and (2) the Board is without authority to approve the dual rate system proposed by the conference since the system would be unjustly discriminatory and unfair as between carriers, shippers, exporters and importers, would operate to the detriment of the commerce of the United States, and would be in violation of the act. The protest of Justice was substantially similar to the Isbrandtsen protest, as amended.

"On January 21, 1953 we granted a hearing on the protests, but denied the requests to suspend the operation of the dual rate system, stating that (1) the conference statement appeared to comply with the requisites of General Order 76, (2) the proposed differential between contract and non-contract rates did not appear to be arbitrary, unreasonable, or unjustly discriminatory; (3) it did not appear that the initiation of the proposed dual rate system would be unjustly discriminatory or unfair or detrimental to the commerce of the United States or in violation of the act; and (4) it did not appear that the initiation of the system would cause irreparable injury to Isbrandtsen.

"On January 22, 1953, Isbrandtsen filed in the U. S. Court of Appeals for the District of Columbia Circuit a petition for review of our January 21 order. That court, on the same day, granted a temporary stay of the order until such time as Isbrandtsen's application for an interlocutory injunction could be heard. On March 23, an interlocutory injunction was granted, staying so much of our January 21 order as purported to approve institution of the dual rate system. Petitions for certiorari, filed by us and by the conference, were denied by the Supreme Court.

"On January 21, 1954, the Court of Appeals set aside so much of the January 31, 1953 order as purported to approve the proposed dual rate system, holding that section 15 of the act requires our approval before a dual rate system may be effectuated and enjoined the conference from effectuating the system prior to such approval.

"On August 17, 1953, we granted the petition of the Department of Agriculture for leave to intervene in this proceeding. Thereafter, hearings were conducted before an examiner during the period October 5 through December 23, 1953." [Footnotes omitted.]

h. The Report of the Board dated December 12, 1955, but not served on the public until December 14, 1955 (a copy of which is attached hereto as Exhibit A), purports to approve the use of the exclusive patronage contract systems by the Conference, subject to the Conference, unilaterally making certain major modifications in the exclusive patronage contract, despite the fact that the Conference never submitted, nor did General Order 76 ever require or provide for, the filing of the specific agreement which might be involved between the conference lines. It is furthermore decided in said report that the system should be allowed to go into effect on January 1, 1956, without stating, despite a difference in time of over one and one-half days between Washington and Japan, whether this time is to be computed in Washington, Japan, or elsewhere.

11. The Board's report of December 12, 1955, contains several erroneous conclusions of law, without which the Board's decision could not possibly be supported. Many constitutive, pivotal, or basic findings of fact in such report are not based "upon consideration of the whole record" nor are they in any way "supported by and in accordance with the reliable, probative, and substantial evidence," as required by Section 7 of the Administrative Procedure Act, 5 U.S.C. 1009. Many of the Board's findings, moreover, are inconsistent with other findings and inconsistent with the Board's ultimate conclusions. Without limiting the scope of this petition in any way or the scope of review sought,

which is a review of the entire record before the Board, the following findings of the Board are cited for illustration:

a. The Board on page 6 of its mimeographed report points out that there never has been any language in the conference agreement "specifically authorizing the use of the dual rate system," but that the Conference from 1928 through 1941—in violation of law—did employ this system without approval. The Board further finds, on the same page, that by employing the dual rate system before the war the Conference was able to suppress and eliminate direct liner competition.

b. The Board finds on pages 6 and 7 of its mimeographed report that:

"Since the resumption of private steamship operation after World War II, Isbrandtsen has been the sole non-conference line which has maintain (sic) a berth service in the Japan Atlantic trade."

c. The Board finds on page 11 of its mimeographed report that prior to March 12, 1953 [when the conference started a rate war]:

"Various shippers have considered the general level of conference rate to have been too high, . . ."

The Board further found on the same page that:

"Additionally, shipprs testified to a lack of success until subsequent to March 1953, in their efforts to convince the conference to reduce the level of rates on various commodities."

d. The facts concerning the refusal of the Conference to meet competition in the usual American way and its deliberate attempt to eliminate petitioner's competition by starting a rate war, in flagrant disregard of the interests of shippers, are set forth in findings appearing on pages 11 and 12 of the Board's mimeographed report as follows:

"At a special meeting of March 9, 1953, the conference discussed steps might be taken to meet Isbrandtsen's competition and resolved to call a special meeting to pass on a

proposal to grant a 20 percent discount on all tariff rate items as a method of meeting non-conference competition and minimizing rumored rebating among the member lines. At a special meeting of March 12, 1955, however, the proposal was rejected and, instead, the conference voted to open conference tariff rates on ten of the major commodities moving in the trade. At various subsequent times the conference has voted to open rates on most of the commodities that move in substantial volume in the trade, with the exception of refrigerated cargo. *No advance notice of the initial or subsequent opening of rates was given to interested shippers, and no minimum rates were established on any of the open rated commodities.* The decision to open rates was made 'in view of the action taken previously by the Trans-Pacific Freight Conference of Japan.' The Conference secretary testified that the conference would have lost cargo for points in inland United States to the Trans-Pacific Freight Conference of Japan had this action not been taken. Like the rejected proposal to reduce rates by 20 percent, the opening of rates was directed at non-conference competition and the rumored rebating by member lines. *In addition, it was hoped that the rate war would lead to Isbrandtsen's joining the conference* or to the institution of the dual rate system or other system.

"After March 12, 1953, the level of rates charged dropped, first, to about 80 percent, and later to about 30 percent to 40 percent of the pre-March 12 level. On a fairly large number of items, some lines have charged rates as low as $6.00-$6.50 per ton, while handling costs alone in this trade are approximately $8.50 per ton." [Emphasis added.]

e. The Board finds on pages 12 and 13 of its mimeographed report that petitioner soon after the rate war started attempted to apply minimum compensatory rates below which it would not carry cargo. The Board further finds that since May 1953, when petitioner's minimum rates were established it "has carried little cargo in the trade." The Board also found that the Conference refused Isbrandtsen's public and unequivocal offer "to apply reasonable rates which might be set by the Conference."

f. The Board finds on page 13 of its report that the rate war instituted by the Conference has been detrimental to

ne interests of shippers and detrimental to the commerce f the United States as follows:

"Many Japanese shippers have requested the conference o close rates and to end the rate war. The resultant insta- ility has affected the smooth flow of commerce between apan and the United States; has raised a threat that ustoms duties in the United States might be increased; as affected the value of inventories of Japanese goods in he United States; has caused requests for postponement f shipments by F.O.B. buyers in the United States, since uch buyers assume the risk of fluctuating freight rates. rices for the sale of Japanese goods are often fixed by he importers in the United States as much as six months n advance of their arrival in the United States."

The Board found, further, that the rate war, instituted on March 12, 1953, has resulted in United States-flag lines carrying little or no cargo in the trade—at least up to the ime of the hearing. Despite these deleterious results which ollowed from the Conference's display of power in an ttempt to force the hand of the Board, the Board has llowed the Rate War to continue from March 12, 1953 to he present, without taking any action whatsoever. The Board admits that it had at all times the power, and, indeed, he sanction to end the rate war by methods short of the stablishment of a monopoly, as now recommended in its report of December 2, 1955, for the Board states on page 46 of its mimeographed report that:

"In any event this Board has full power over those rates of conference carriers in foreign commerce which are detri- mental to the commerce of the United States."

g. The Board finds on pages 14 and 15 of its mimeo- graphed report that the 9½ per cent differential between contract and non-contract rates was arbitrarily established, it being the differential the Conference considered itself limited to under Japanese law.

h. The Board finds, on page 16 of its mimeographed re- port, that many shippers would be effectively coerced into

signing exclusive patronage contracts because of Isbrandtsen's infrequency of service, its lack of reefer space and special silk rooms, and by the fact that Isbrandtsen's vessels serve only North Atlantic ports and not the Gulf ports, as well as not serving several other ports served by the Conference. In this respect, the Board states on page 16 as follows:

"Isbrandtsen's carryings, if a dual rate system were put into effect in this trade, would be limited by the lack of reefer space and special silkrooms on Isbrandtsen vessels and by the limited frequency and range of service of those vessels. Shippers of dry cargo destined for Gulf ports, shippers of reefer cargo, and shippers requiring more than two sailings per month would, practically, have no choice between the conference and Isbrandtsen's service as presently constituted."

i. The Board finds further on page 16 of its mimeographed report that:

"There would, under the dual rate system, be no difference in the cost or value of service rendered to two shippers, one of which is a contract signatory and the other of which is not a contract signatory, although the cargoes of each might be identical and identically destined." [Emphasis supplied.]

j. The Board's findings on pages 17 and 18 of its mimeographed report leave no doubt that shippers were generally unfamiliar with the exclusive patronage contract approved by the Board and had no voice in drafting its provisions. The Board finds on pages 17 and 18 as follows:

"Most shippers appearing in this proceeding were not familiar with the terms of the proposed contract. One shipper was under the impression that the terms of the contract had not yet been definitely arrived at and, like the rates, were to be the subject of discussions between the shippers and the conference. Subsequently, a large shipper organization submitted proposed contract amendments to the conference, including recommendations that (1) the volume of obligated cargo should be no less than 85 percent of the shipper's total cargo moving in the trade;

2) an f.o.b. or f.a.s. shipment cannot move under contract ates unless the Japanese shipper is authorized to route he shipment or unless the f.o.b., f.a.s. buyer is signatory o a dual rate contract; (3) rate increases should not be ffected until the termination of the calendar month in hich notice of increase is given and of the three succeeding alendar months; (4) if the carriers do not furnish service n request, the shipper may (a) ship via non-conference ine if not notified by the secretary of space aboard a con- erence vessel within the period of time *designated by the hipper* and (b) recover from the conference, as liquidated lamages the excess of freight, above conference rates, ctually paid for shipment; (5) liquidated damages for reach of agreement by the shipper should be 20 percent f the freight which the shipper would have paid had the hipment moved via conference vessel; and (6) the carriers nd the shippers should appoint a special committee, com- osed of representatives of each, for the purpose of dis- ussing amendments to the agreement and reasonable levels f freight rates."

The above-mentioned witnesses, moreover, were the shipper witnesses of the Conference and in no respect are to be considered typical of the over-all shipper attitude with respect to employment of the dual rate system by the Con- ference. The facts of record are undisputed that many shippers oppose the use of the system.

k. The Board states on page 38 of its report that:

"We consider dual rate contracts to be, in nature, highly analogous to volume discounts; although a shipper does not promise to ship a specific amount of cargo, the expres- sion of his obligation in terms of percentages gives the conference lines as great an assurance of a basic core of cargo on which to rely in planning future vessel require- ments as that which would result from a promise to ship a specific amount of cargo within a given period."

The above conclusion is legally erroneous and, furthermore, it is contrary to the facts of record. It is incomprehensible what the phrase "in terms of percentages" may mean, for there is nothing about it in the record.

1. The Board avoids any finding on the irreparable injury that will be caused to petitioner or whether petitioner could possibly continue as an independent carrier in the trade, in view of the monopolistic weapons handed to the Conference by the Board. The Board, however, in an inconsistent finding or conclusion on page 46 of its report states as follows concerning the desirability of petitioner continuing as an independent carrier:

"While Isbrandtsen's share of the traffic may, as stated, be reduced, we do not anticipate that such increase in conference controlled traffic will result in the traditional evils associated with monopoly. *The continued participation of Isbrandtsen in the trade, as well as the existence of strong shipper organizations, stand as a strong deterrent against exorbitant freight rates and other objectionable monopolistic practices.*" [Emphasis added.]

m. The Board admits on page 50 of its mimeographed report that there was nothing before it to approve except the Conference's amorphous and inchoate filing under the Board's General Order 76 and the proposed exclusive patronage contract, which is between the Conference lines and shippers and could not in any event be approved under Section 15 of the Shipping Act and entitled to any immunity from the Anti-Trust Laws. The filing of the Conference under General Order 76 does not contain any clearly stated "agreement" or "understanding" between the carriers involved and, accordingly, it is impossible to determine the scope of the agreement approved by the Board. As the Board itself found on page 50 of its mimeographed report:

"The conference has not considered its General Order 76 filing as a filing for approval under section 15 of the Act."

Under these circumstances, it is clear that there was never any effective filing of an exclusive patronage contract agreement between the conference carriers to the Board. Under the Administrative Procedure Act, opponents or prot-

estants of such an agreement certainly have the right to know at least at the hearing what is being presented to the Board for approval. Under these circumstances, since the Board does not state what agreement it has approved, its "approval" is a futile and meaningless act and cannot be allowed to have any legal effect.

12. Petitioner would be irreparably and permanently injured and damaged if the Conference should be allowed to institute its exclusive patronage contract system. Because of the admitted economic coercion the Conference would be able to impose upon shippers in the trade, petitioner would lose many of its regular customers, would be deprived of the markets it has created over the years through its own efforts and at large expense, and would not even have the opportunity of soliciting or approaching shippers in the trade for their business. The fundamental right afforded by our laws under the American system of free enterprise, namely, access to customers and the opportunity to do business, would be denied to your petitioner.

Wherefore petitioner prays that this Court:

A. Enjoin, set aside, annul, and suspend the report of the Federal Maritime Board, dated December 12, 1955, and any order or approval issued therein.

B. Enter an interlocutory injunction suspending and restraining the enforcement, operation, and execution of the Board's report insofar as it would allow the Japan-Atlantic and Gulf Freight Conference to employ in any manner whatsoever the exclusive patronage contract rate system.

C. Enter a temporary stay and suspension of the operation or execution of said Board report and any order of the Board pending the hearing on the application for such interlocutory injunction.

D. Adjudge, order, and decree that the Board's report and approval purporting to authorize the use of the exclusive patronage contract rate system by the Conference is, and at all times was, beyond the legal authority of the Board, in violation of the legal rights of petitioner, and wholly void and of no legal force and effect, and that such report and approval be perpetually vacated, set aside, and annulled, and the operation and execution thereof be perpetually and permanently restrained and enjoined.

E. Permanently enjoin and restrain the Conference from coercing shippers in the trade to use conference line vessels or otherwise interfering with petitioner's right to do business and have free access to its shipper customers.

F. Grant such other and further relief as the Court may deem just and proper in the premises.

/s/ JOHN J. O'CONNOR
Attorney for Petitioner
Isbrandtsen Company, Inc.
Washington Building
Washington 5, D. C.

Dated: Washington, D. C.
December 19, 1955

Report of Federal Maritime Board

(Served December 14, 1955)
(Federal Maritime Board)

No. 730

THE MATTER OF THE STATEMENT OF JAPAN-ATLANTIC AND ULF FREIGHT CONFERENCE FILED UNDER GENERAL ORDER 76

roposed exclusive patronage contract/non-contract system of the Japan-Atlantic and Gulf Freight Conference approved under section 15 of the Shipping Act, 1916.

he exclusive patronage contract/non-contract system of the Japan-Atlantic and Gulf Freight Conference not found to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States or to be in violation of the Shipping Act, 1916.

pproval granted under section 15 of the Shipping Act, 1916, contingent upon modification of the proposed exclusive patronage contract to reflect the views of the Board.

Herman Goldman, Elkan Turk, Seymour H. Kligler and *lkan Turk, Jr.*, for Japan-Atlantic and Gulf Freight Conference, respondent.

John J. O'Connor and *John J. O'Connor, Jr.* for Isbrandtsen Co., Inc., petitioner.

Edward P. Hodges, James E. Kilday, William J. Hickey nd *Frank J. Oberg* for the Department of Justice, petitioner.

Chas. B. Bowling, Chas. D. Turner, Charles W. Bucy, larry Ross, Jr., and *Henry A. Cockrum* for United States Department of Agriculture, intervener.

Max E. Halpern, John Mason, Edward Aptaker, and *Richard W. Kurrus* as Public Counsel.

REPORT OF THE BOARD

By the Board:

This proceeding arose out of a statement filed on December 24, 1952, by the Japan-Atlantic and Gulf Freight Con-

ference (the conference) pursuant to section 236.3 of General Order 76[1] proposing to initiate an exclusive patronage contract/non-contract freight rate system (dual rate system) in the trade from Japan, Korea, and Okinawa to United States Gulf ports and Atlantic Coast ports of North America, the system to become effective on the 30th day following the filing. Protests against the proposed system have been filed by Isbrandtsen Company, Inc. (Isbrandtsen), an independent steamship company operating in the Japan-Atlantic trade, and by the Department of Justice (Justice).

Under the proposed dual rate system, contract rates set at a level below non-contract rates, would be charged, on all commodities moving in the trade, to those shippers promising to ship exclusively via conference vessels during the period of the contract. A second and higher level of rates would be charged non-singing shippers. The differential or spread between the levels of contract and non-contract rates was fixed in the statement at 9½ percent of the contract rates applicable to the respective tariff items, rounded off to the nearest quarter of a dollar.

As required by General Order 76, the conference statement set forth (a) the amount of differential or spread between the proposed contract and non-contract rates, (b) the effective date of the proposed system, (c) the reasons for the use of dual rates in the trade involved, (d) the basis for the differential or spread, and (e) copies of the form of contract proposed to be used.

In its protests of January 12, 1953 to the conference statement, Isbrandtsen requested that we (1) grant a hearing on the lawfulness of the proposed dual rate system under sections 14, 15, 16 and 17 of the Shipping Act, 1916 (the act); (2) direct the conference not to effectuate the proposed dual rate system pending completion of the hearing,

[1] 17 F.R. 10175.46 C.F.R. 236.3 (Nov. 10, 1952).

nd alternatively (3) reject the conference statement, without a hearing, for non-compliance with General Order 76. n its supplemental and amendatory comments of January 9, 1953, Isbrandtsen argued that (1) it would be unlawful, nder section 15 of the act, for the conference to initiate dual rate system without prior Board approval and (2) he Board is without authority to approve the dual rate ystem proposed by the conference since the system would e unjustly discriminatory and unfair as between carriers, hippers, exporters and importers, would operate to the letriment of the commerce of the United States, and would e in violation of the act. The protest of Justice was substantially similar to the Isbrandtsen protest, as amended.

On January 21, 1953 we granted a hearing on the protests, ut denied the requests to suspend the operation of the ual rate system, stating that (1) the conference statement appeared to comply with the requisites of General Order 76, (2) the proposed differential between contract nd non-contract rates did not appear to be arbitrary, nreasonable, or unjustly discriminatory; (3) it did not ppear that the initiation of the proposed dual rate system would be unjustly discriminatory or unfair or detrimental o the commerce of the United States or in violation of he act; and (4) it did not appear that the initiation of the system would cause irreparable injury to Isbrandtsen.

On January 22, 1953, Isbrandtsen filed in the U. S. Court of Appeals for the District of Columbia Circuit a petition for review of our January 21 order. That court, on the same day, granted a temporary stay of the order until such time as Isbrandtsen's application for an interlocutory injunction could be heard. On March 23, an interlocutory injunction was granted, staying so much of our January 21 order as purported to approve institution of the dual rate system. Petitions for certiorari, filed by us and by the conference, were denied by the Supreme Court.[2]

[2] *F.M.B. et al.* v. *Isbrandtsen Co., Inc.*, 345 U.S. 975 (1953).

On January 21, 1954, the Court of Appeals set aside so much of the January 21, 1953 order as purported to approve the proposed dual rate system, holding that section 15 of the act requires our approval before a dual rate system may be effectuated and enjoined the conference from effectuating the system prior to such approval.[3]

On August 17, 1953, we granted the petition of the Department of Agriculture for leave to intervene in this proceeding. Thereafter, hearings were conducted before an examiner during the period October 5 through December 23, 1953.

In recommended decision dated September 13, 1954, the examiner found that (1) the conference statement complied with the requirements of General Order 76; (2) the differential between contract and non-contract rates would not be arbitrary, unreasonable, or unjustly discriminatory; (3) the initiation of the proposed dual rate system would not be unjustly discriminatory, unduly prejudicial or unfair or detrimental to the commerce of the United States; and (4) the proposed dual rate system would not cause irreparable injury to Isbrandtsen. On motion of Isbrandtsen, Justice and Public Counsel, we, by order dated October 6, 1954, remanded the record to the examiner with instructions to prepare supplemental findings of fact as to the basis for the spread between contract and non-contract rates and as to the reasonableness of the exclusive patronage contracts proposed for use in the trade, and with instructions to show the ruling upon the findings of fact and conclusions of law proposed by the parties.

On January 17, 1955, the examiner served his supplemental findings on those matters specified in the order of remand. Exceptions to the recommended decision, as supplemented, were filed by all parties to the proceeding and oral argument on the exceptions has been heard. Exceptions and proposed findings not discussed in this report

[3] *Isbrandtsen Co., Inc.* v. *United States et al.*, 211 F. 2d 51 (1945).

nor reflected in our findings have been considered and found not justified by the facts or not related to material issues in this proceeding. Recommended findings and conclusions of the examiner are not adopted herein unless so specified.

We find the following to be the basic evidentiary facts:

Basic Facts

The conference is a voluntary association of seventeen steamship lines[4] operating under authority of Agreement FMB No. 3103 as amended, between Japan, Korea, and Okinawa, and the Gulf and Atlantic Coasts of North America.

Members of the Conference and its predecessor organization, the Japan-Atlantic Coast Freight Conference, have operated as common carriers in the trade from Japan to the Atlantic Coast of North America under successive agreements, the first of which was an agreement between two Japanese and one U. S. Flag line, executed on November 14, 1922 and finally approved by our predecessor, the Shipping Board, on February 16, 1926, as Agreement No. 73-1. A succeeding agreement, No. 129, was amended to include Gulf ports as discharging ports. All subsequent agreements have included both Gulf and Atlantic ports.

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[4] The present membership of the conference is as follows:
a. Mitsui Steamship Co., Ltd.
b. Kawasaki Kisen Kaisha
c. Kokusai Line
d. Nippon Yusen Kaisha
e. Osaka Shosen Kaisha, Ltd.
f. Shinnihon Steamship Co., Ltd.
g. Barber-Wilhelmsen Lines *
h. American President Lines, Ltd.
i. A. P. Moller, Maersk Line *
j. Yamashita Kisen Kaisha
k. Waterman Steamship Corporation
l. Lykes Bros. Steamship Co., Inc.
m. United States Lines Company (American Pioneer Line)
n. States Marine Corporation and States Marine Corporation of Delaware
o. Ivaran Lines—Far East Service *
p. De La Rama Lines *
q. Daido Kaiun Kaisha

* Represents a joint service the membership of each of which consists of two or more ship owning corporations (R. 33, Exhibits 22, 60, 70, and 71).

The current agreement, FMB No. 3103, approved in unamended form on June 25, 1934, was executed by eight lines, one American, five Japanese, and two others, all parties to the agreement[5] at the time of hearing herein.

Private steamship operations in the conference trade ceased on or about December 8, 1941 due to the outbreak of war between Japan and the United States; private steamship lines commenced operations on or about March 2, 1946, carrying cargoes for Supreme Commander for the Allied Powers (SCAP) under rates set by War Shipping Administration. Licenses were issued by SCAP to private steamship companies commencing on November 1, 1947. Private exporting by Japanese merchants was not resumed until the latter part of 1948 or early 1949. The conference continued to exist, at least nominally, during the Second World War, with American President Lines, Ltd., Barber-Wilhelmsen Line, and A. P. Moller, Maersk Line as members. The conference was formally reestablished in Japan on December 13, 1948. Of the ten lines constituting the conference membership in 1948, three were conference members in 1934 when the present agreement was approved, in unamended form, by our predecessor, the Shipping Board.

While Agreement No. 3103, as amended (hereinafter the basic agreement) permits the establishment, regulation, and maintenance of agreed rates, it contains no language specifically authorizing the use of the dual rate system. The conference, however, from 1928 through 1941, employed a dual rate system for various commodities. The system in 1928 covered only three commodities but was extended in 1934 in Tariff No. 10 to cover all important commodities moving in the trade. In pre-war tariffs the differential was set on a dollar rather than percentage basis and varied from commodity to commodity and from tariff to tariff. Expressed in percentages, the pre-war differentials between contract

[5] Dollar S.S. Lines, Inc., Ltd., has been succeeded by American President Lines, Ltd. The present member, Nippon Yusen Kaisha, was in 1934 represented by itself and its Kobe Branch.

and non-contract rates ranged from 12% to 66⅔% of the contract rates.

Prior to World War II, due at least in part to the existence of the dual rate system, the conference had no direct liner competition and little tramp competition. Commodities normally moving in this trade are not conducive to tramp movement.

Since the resumption of private steamship operation after World War II, Isbrandtsen has been the sole non-conference line which has maintained a berth service in the Japan-Atlantic trade. From 1947 to early 1949, Isbrandtsen operated from Japan to Atlantic Coast ports of the United States via the Suez Canal. Since early 1949 Isbrandtsen has operated an approximately fortnightly service from Japan to U. S. Atlantic Coast ports via the Panama Canal as part of its Eastbound, Round-the-World service.[6] Although Isbrandtsen chartered three foreign-flag vessels for single sailings in this trade in 1950 and 1951, it has otherwise exclusively employed its eleven United States-flag vessels in this trade. In other trades, Isbrandtsen employs both U. S.-flag and foreign-flag vessels. None of Isbrandtsen's vessels are equipped with refrigerated space or special silkrooms as are many of the conference vessels.

Conference membership is open to any common carrier regularly operating or intending regularly to operate in the trade. Isbrandtsen has remained outside the conference as a matter of policy, although invited to join.

Most of the conference vessels commence loading inbound cargo for the United States at the Philippines, proceed to Hong Kong and complete loading in Japan. Most of the conference vessels discharge at Pacific, Gulf and Atlantic

[6] Isbrandtsen's vessels in the Round-the-World service proceed from United States North Atlantic ports to Mediterranean ports and through the Suez Canal to Bombay, Colombo, Singapore, Manila, Hong Kong, Keelung, Kobe, Nagoya, Shimizu, Yokohama, San Francisco, Los Angeles, and return via the Panama Canal to United States North Atlantic ports.

ports of the United States.[7] The amount of cargo moving from Japan to Gulf ports of the United States has been small in comparison with the amount of such cargo moving to ports on the Atlantic Coast of the United States. While Isbrandtsen sometimes loads inbound cargo for the United States in India, Ceylon, and Singapore, such carryings are minor. Its principal inbound United States carryings, aside from cargo from Japan in this trade and in the Japan-United States Pacific Coast trade, have been cargoes lifted in the Philippines. Cargo from Hong Kong and Japan is carried largely on a measurement basis[8] and moves under higher freight rates than the primarily weight and bulk cargo originating in the Philippines. Ideally, on a vessel of 10,000 dwt capacity, owners prefer to carry about 3,000 tons of weight cargo and to devote the remainder of the vessel's dwt capacity, exclusive of capacity required for fuel, water, and stores to the higher paying measurement cargo. In allocating space as between Japanese and Philippine cargo, the higher rated Japanese cargo is given priority.

The comparative sailings and carryings of Isbrandtsen and the conference lines in the Japan-Atlantic and Gulf trade from 1949 through July 1953 are indicated in the following table:

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[7] Lykes serves U. S. Gulf ports only; from 1949 to the close of hearings in this proceeding States Marine vessels returned to the United States in ballast. American President Lines operates from Japan to Atlantic Coast ports of the United States via the Suez Canal as a part of its Westbound, Round-the-World Service.

[8] Japanese measurement cargo stows about three measurement tons to one deadweight ton.

TABLE I

Calendar Year	Number of Sailings: Isbrandtsen	Conf.	Total	Cargo Carried (Revenue Tons): Isbrandtsen	Conf.	Total	Average Carryings Per Sailings: Isbrandtsen	Conf.	Percentage of Total Liner Cargo: Isbrandtsen	Conf.
1949	6	103	109	13,099	135,635	153,734	3,016	1,317	12	88
1950	21	137	158	120,381	229,829	350,210	5,780	1,678	34	66
1951	21	174	195	93,450	219,343	312,793	4,450	1,261	30	70
1952	24	221	245	98,834	281,308	380,142	4,118	1,273	26	74
1953 6 mos.	12	153	165	37,308	189,503	226,811	3,109	1,239	16	84

The comparative sailings and carryings of Isbrandtsen and the conference lines from the Philippines to Atlantic and Gulf ports are indicated in the following table:

TABLE II

Calendar Year	Number of Sailings: Isbrandtsen	Conf.	Total	Cargo Carried (Revenue Tons): Isbrandtsen	Conf.	Total	Average Carryings Per Sailings: Isbrandtsen	Conf.	Percentage of Total Liner Cargo: Isbrandtsen	Conf.
1949	9	79	88	8,977	262,435	271,412	997	3,322	3	97
1950	20	107	127	4,548	491,405	495,953	227	4,593	1	99
1951	16	126	142	11,416	485,271	496,687	714	3,851	2	98
1952	20	193	213	20,148	907,065	927,203	1,007	4,700	2	98
1953	12	127	139	21,564	573,774	595,338	1,797	4,518	4	96

The total carryings in revenue tons of Isbrandtsen from Hong Kong to Atlantic ports in any calendar year from 1949 through the first six months of 1953 have been less than 1 percent of the total carryings of Japan-Atlantic and Gulf Freight Conference vessels operating in that trade. The combined total carryings from Hong Kong by the conference and Isbrandtsen, however, are insignificant when compared with carryings from Japan and the Philippines.

The trade from Japan to the Atlantic Coast of the United States is presently overtonnaged. Total sailings in the trade rose from 109 in 1949 to more than 300 in 1953 (Table 1—projected for 1953). The re-entry of Japanese lines in the trade, four in 1951 and four in 1952, on permission of SCAP, greatly contributed to the excess of tonnage. The effect of the re-entry of the Japanese lines can be readily seen from the fact that those lines in the years 1951, 1952,

and in the first six months of 1953, carried, approximately, 15 percent, 49 percent, and 66 percent, respectively, of the trade's total liner cargo.

United States-flag lines, including Isbrandtsen, but excluding American President Lines and Lykes, carried 53 percent of the total liner cargo in the Japan-Atlantic trade in 1950, 46 percent in 1951, 34 percent in 1952, and 21 percent in the first six months of 1953.

Partly as a result of the overtonnaging in this trade, the vessels of both Isbrandtsen and the conference have had substantial free and usable space after completion of loading in Japan.

At its meeting of October 29, 1952, the conference discussed "strong rumors and indications that some member lines were not adhering to tariff rates and regulations" and resolved to bring the rumored malpractices to the attention of the Japanese Ministry of Transport. In the subsequent letter written to the Ministry, the conference recited the rumored conditions and indicated that the continuance of such a state of affairs "will probably result in a complete breakdown of the conference structures now in existence." In response to the conference letter, the Ministry of Transportation issued a warning to each of the conference member lines.

All postwar conference tariffs have provided for both contract and non-contract rates but only the contract rates have been effective. Prior to November 15, 1952, the effective date of the current Tariff No. 30,[9] the differential between contract and non-contract rates was $4.00 for all commodities. The differential in Tariff No. 30 is 9½ percent of the contract rates, rounded off the the nearest quarter of a dollar. The level of rates in conference postwar tariffs gradually increased between 1947 and November 15, 1952 when a general reduction in rates was effected.

[9] Tariff No. 30 is presently in effect on those items which have not been opened by the conference.

On most commodities, Isbrandtsen's rates, between 1947 and March 12, 1953, were maintained, on the average, at a level approximately 10 percent below the corresponding tariff rates, although individual rates on specific commodities in relation to conference rates have varied considerably, percentagewise, from time to time. The general understanding of shippers and carriers in the trade is that Isbrandtsen underquotes conference rates by 10 percent. From time to time, Isbrandtsen's Tokyo agents have issued, without express consent of Isbrandtsen, so-called abbreviated freight tariffs which compare conference and Isbrandtsen rates on major commodities. On most items of these abbreviated tariffs, Isbrandtsen rates are 10 percent lower than conference rates. As a matter of policy, Isbrandtsen quotes rates lower than those of its competitors, but never knowingly quotes a non-compensatory rate.

Conference rates prior to the outbreak of the rate war in March 1953 were stable, i.e., constant for relatively long periods of time, as were Isbrandtsen's rates for corresponding periods of time. This stability is attributable in large part, however, to the reluctance of the conference to reduce its rates to Isbrandtsen's rate level. Conference increases in rates were followed by Isbrandtsen increases, and when, in November 1952, the conference announced a 10 percent reduction in rates in Tariff No. 30, Isbrandtsen announced that its new rate would be 10 percent less than the conference contract rate.

Conference rates must, under the basic agreement, be filed with the Regulation Office of the Federal Maritime Board and are there open to public inspection. Isbrandtsen is not required to file its inbound rates. Both the conference and Isbrandtsen, however, learn of the other's rates in the normal course of operation in the trade.

Most shippers in this trade are primarily interested in low, uniform and stable freight rates. There is a tendency on the part of Japanese shippers to favor Japanese lines,

but the tendency is limited to a large extent by the desire for lower freight rates as evidenced by the volume of Isbrandtsen's carryings in this trade. Various shippers have considered the general level of conference rates to have been too high, prior to March 12, 1953.

Additionally, shippers testified to a lack of success until subsequent to March 1953, in their efforts to convince the conference to reduce the level of rates on various commodities. They have testified, however, to better relations with the conference since the recent formation of shipper and exporter associations and expressed hope that the conference will give more consideration to shipper's desires in the future.

Changes in uniform conference rates may only be made upon the affirmative vote of two-thirds of the membership entitled to vote.[10] The conference chairman may obtain telephonic votes on rate matters in lieu of a conference meeting and take rate action on the affirmative vote of two-thirds of the members. Although this procedure gives the conference greater rate-making flexibility, the conference is still at a competitive disadvantage as compared with an individual carrier in making rapid rate changes.

At a special meeting of March 9, 1953, the conference discussed steps which might be taken to meet Isbrandtsen's competition and resolved to call a special meeting to pass on a proposal to grant a 20 percent discount on all tariff rate items as a method of meeting non-conference competition and minimizing rumored rebating among the member lines. At a special meeting of March 12, 1955, however, the proposal was rejected and, instead, the conference voted to open conference tariff rates on ten of the major commodities moving in the trade. At various subsequent times the conference has voted to open rates on most of the commodities that move in substantial volume in the trade, with the exception of refrigerated cargo. No advance notice of

[10] States Marine Corporation is not entitled to vote.

the initial or subsequent opening of rates was given to interested shippers, and no minimum rates were established on any of the open rated commodities. The decision to open rates was made "in view of the action taken previously by the Trans-Pacific Freight Conference of Japan."[11] The conference secretary testified that the conference would have lost cargo for points in inland United States to the Trans-Pacific Freight Conference of Japan had this action not been taken. Like the rejected proposal to reduce rates by 20 percent, the opening of rates was directed at non-conference competition and the rumored rebating by member lines. In addition, it was hoped that the rate war would lead to Isbrandtsen's joining the conference or to the institution of the dual rate system or other system.

After March 12, 1953, the level of rates charged dropped, first, to about 80 percent, and later to about 30 percent to 40 percent of the pre-March 12 level. On a fairly large number of items, some lines have charged rates as low as $6.00-$6.50 per ton, while handling costs alone in this trade are approximately $8.50 per ton.

Isbrandtsen attempted to keep on a competitive basis in the rate war until mid-May 1953, when minimum rates were set. Prior to that time Isbrandtsen's rates equalled the lowest charged in the trade.

The minimum rates, first $15.00, later $12.00 to the U.S. Atlantic Coast adversely affected Isbrandtsen's competitive position in the trade. Effective on July 15, 1953, Isbrandtsen set its rates at 50 percent of the conference Tariff No. 30 level. Since that date, Isbrandtsen has carried little cargo in the trade. On July 17, Isbrandtsen announced its desire to apply reasonable rates which might be set by the conference. Since Isbrandtsen reserved the right to adjust its rates where required, however, the conference considered that the Isbrandtsen announcement contained

[11] Conference minutes for March 12, 1953.

insufficient assurance of stability of rates on which to base conference action. In any event, an Isbrandtsen witness testified that the company did not intend the announcement to be an offer to the conference and did not contemplate any agreement, oral or written, with other lines.

Many Japanese shippers have requested the conference to close rates and to end the rate war. The resultant instability has affected the smooth flow of commerce between Japan and the United States; has raised a threat that customs duties in the United States might be increased; has affected the value of inventories of Japanese goods in the United States; has caused requests for postponement of shipments by F.O.B.[12] buyers in the United States, since such buyers assume the risk of fluctuating freight rates. Prices for the sale of Japanese goods are often fixed by the importers in the United States as much as six months in advance of their arrival in the United States.

The conference has shown interest in reinstating a dual rate system since early 1949 and had twice, prior to the present filing, voted to institute the system, first, on August 30, 1950, and, secondly, on October 29, 1952. On the former occasion, the institution of a dual rate system was delayed on advice of counsel. On the latter occasion, necessity for compliance with our General Order 76 caused further delay in effectuating the system. The conference thereafter, on November 17, 1952, resolved to instruct its counsel to file a statement pursuant to General Order 76, advising of the conference's intention to reinstitute dual rates on the 30th day after such filing, the differential between contract and non-contract rates, on commodities covered to be 9½ percent of the contract rates.

Many of the conference lines favored a differential of 12½ percent to 15 percent, as reasonable and more satis-

[12] Although prior to World War II most commodities in this trade moved under c.i.f. terms, most commodities have since been sold on an f.o.b. or f.a.s. basis.

factory than 9½ percent, but considered the conference limited, under Japanese law, to 9½ percent. The membership considered 9½ percent to be reasonable as (1) not so great as to destroy shippers' freedom of choice between conference and non-conference vessels; (2) in substantial accord with the amount of commercial discount customary in Japan and thus reasonable to Japanese shippers; (3) equalling the amount of spread in use by other conferences operating to and from Japan; and (4) roughly paralleling the amount by which Isbrandtsen generally undercuts conference rates. In this respect it was considered that shippers could benefit under a dual rate system by equal distribution of cargoes to conference and non-conference vessels, since the higher conference non-contract rates would be more than offset by the probable 10 percent differential between conference contract rates and Isbrandtsen's rates. No survey was undertaken by the conference, however, to ascertain the number of shippers who could so divide cargoes between Isbrandtsen and the conference or the volume of cargo which might move under dual rate contracts. The conference is able, however, roughly to estimate the amount of cargo which member lines would obtain under dual rates, because of its support of various exporter organizations and through its knowledge of the trade.

Shipper witnesses in this proceeding have indicated that a 9½ percent differential would be reasonable or within a zone of reasonableness. One shipper, however, indicated that the spread should vary with the relationship between the cost of a commodity and its transportation costs. Where the manufacturer's cost is lower than the freight costs, it was stated, the differential should be low to avoid coercion on the shipper. The shipper indicated, however, that in view of the commodities on which a higher spread reasonably could be applied and in view of the impracticability of ascertaining the relationship of manufacturer's cost to freight cost for each commodity in each instance, the overall spread of 9½ percent between contract and non-contract

rates would be fair, reasonable, profitable and acceptable to shippers. Another shipper withdrew his opposition contingent upon the premise of better future cooperation by the conference in negotiating freight rates with shippers and in discussing terms and conditions of the dual rate contracts.

The conference is subject to the regulatory jurisdiction of the Japanese Government as well as to that of the U. S. Government. While the Fair Trade Commission, the agency responsible for final determinations under the Japanese Marine Transportation Law,[13] does not give prior approval to dual rate contracts, that agency advised the conference that a 9½ percent differential was the highest that it had yet allowed.

It is reasonable to anticipate a total cargo movement of 500,000 revenue tons per year in this trade in view of the trend towards increased movement since World War II. Of this tonnage, it is anticipated that the conferenee, under dual rates, would carry about 90 percent or less of the total cargo and Isbrandtsen 10 percent or more, a substantial reduction from its carriage in 1952, of 26 percent of the cargo in the trade. Assuming that Isbrandtsen would carry, under single closed rates 20 percent of an annual 500,000 revenue tons, irrespective of whatever rates may eventually be established by the conference if those rates exceed out-of-pocket expenses, the conference lines, in employing the proposed dual rate system, would have to carry an additional 38,000 revenue tons of cargo in order to grant a discount of 9½ percent and still earn the same gross revenues they would have earned carrying 80 percent of the total liner cargo movement without discount. Since, as stated, the conference could be expected to carry 90 percent of the

[13] Law No. 187, June 1, 1949.
Articles 28 and 30 of that law prohibit: (a) deferred rebates, (b) fighting ships, (c) retaliation against a shipper, (d) unjustly discriminatory contracts based on volume of freight, (e) undue or unreasonable preference or prejudice, and (f) combinations that exclude any party from admission.

total liner cargo, or about 50,000 additional revenue tons, it is clear that the use of the system would result in a reduction in the average fixed unit costs of conference vessels.

Isbrandtsen's carryings, if a dual rate system were put into effect in this trade, would be limited by the lack of reefer space and special silkrooms on Isbrandtsen's vessels and by the limited frequency and range of service of those vessels. Shippers of dry cargo destined for Gulf ports, shippers of reefer cargo, and shippers requiring more than two sailings per month would, practically, have no choice between the conference and Isbrandtsen's service as presently constituted.

There would, under the dual rate system, be no difference in the cost or value of service rendered to two shippers, one of which is a contract signatory and the other of which is not a contract signatory, although the cargoes of each might be identical and identically destined. The contract shipper, however, by enabling the conference lines to estimate the amount of cargo available for carriage, and accordingly, to plan vessel sailings and space in a more economical fashion, aids those carriers in reducing unit costs of carriage, and thus, to improve their services to shippers.

The proposed form of dual rate contract would be entered into between individual shippers and the several members of the conference for an indefinite period, subject to cancellation by either party on three months' notice. The shipper, under Article 1, would be obliged to forward by conference vessels all shipments made directly or indirectly by him "whether such shipments are made C.I.F., C. & F., F.O.B., ex godown or by any other terms." This provision is modified by Article 6 which specifies that if a shipper submits written proof *satisfactory to the* conference secretary that a foreign buyer, on an f.o.b. or f.a.s. shipment has designated a non-conference vessel for a shipment, then such shipment is exempt from the terms of the agreement. Such foreign buyer would be thereafter denied contract

rates until such time as the buyer should execute a dual rate contract. Until the first shipment via non-conference vessel, however, the foreign buyer on f.o.b. or f.a.s. shipents may receive the benefit of contract rates without signing a contract.

In the event of breach of the agreement by the shipper by shipment via non-conference vessel, the shipper contracts to pay, as liquidated damages, 50 percent of the freight which would have been paid at conference contract rates, had the shipment moved via a conference line. In turn, the conference members agree to maintain a shipping service adequate to meet the reasonable requirements of the trade. Each carrier, under Article 11, is responsible for its own part of the agreement only. Although the carriers do not agree to respond in damages in the event of any inadequacy of service, they do agree, in Article 4 that a shipper may secure space elsewhere, if after application to the conference secretary he is not notified within three days, Sundays and holidays excepted, of the availability of space on conference vessels within the ensuing fifteen day period.

Article 11 provides that new lines admitted to conference membership shall automatically become entitled to participation in the contract. Under Article 12 shippers are required to submit an approximation of the annual tonnage which would move under the contract. Rate increases would not be effective until the expiration of the calendar month in which notice of increase is given and of the two following calendar months. The entire agreement is subject to all conference rules, regulations, terms and conditions of the conference tariff current at the time of shipment.

Most shippers appearing in this proceeding were not familiar with the terms of the proposed contract. One shipper was under the impression that the terms of the contract had not yet been definitely arrived at and, like the rates, were to be the subject of discussions between the shippers

and the conference. Subsequently, a large shipper organization submitted proposed contract amendments to the conference, including recommendations that (1) the volume of obligated cargo should not be less than 85 percent of the shipper's total cargo moving in the trade; (2) an f.o.b. or f.a.s. shipment cannot move under contract rates unless the Japanese shipper is authorized to route the shipment or unless the f.o.b., f.a.s. buyer is signatory to a dual rate contract; (3) rate increases should not be effected until the termination of the calendar month in which notice of increase is given and of the three succeeding calendar months; (4) if the carriers do not furnish service on request, the shipper may (a) ship via non-conference line if not notified by the secretary of space aboard a conference vessel within the period of time *designated by the shipper* and (b) recover from the conference, as liquidated damages the excess of freight, above conference rates, actually paid for shipment; (5) liquidated damages for breach of agreement by the shipper should be 20 percent of the freight which the shipper would have paid had the shipment moved via conference vessel; and (6) the carriers and the shippers should appoint a special committee, composed of representatives of each, for the purpose of discussing amendments to the agreement and reasonable levels of freight rates.

Discussion and Ultimate Findings

Parties to this proceeding have questioned our authority under section 15 of the act to approve any dual rate system and urge that such systems are in themselves unlawful, without regard to specific facts which may be adduced.

The protests and comments directed by petitioners to the conference's statement filed pursuant to General Order 76, put in issue the lawfulness of the dual rate system itself in addition to raising issues of fact.

It is urged by petitioners that the system is necessarily unlawful under section 14 of the act and that we are without statutory authority to approve the dual rate system under

section 15 of the act. More particularly stated, petitioners' arguments are as follows:

(1) Paragraph 3 of section 14 of the act makes unlawful any retaliation against shippers by resort to discriminating or unfair methods because such shipper has patronized any other carrier. Since any discrimination is prohibited by the section and not only those discriminations which are unjust, unreasonable or unfair, since the charging of different rates for the same service is prima facie discriminatory, and since the system is a device for compelling exclusive patronage, the dual rate system is necessarily violative of section 14 of the act.

(2) Section 15 forbids approval of agreements which are in violation of the act. Since, it is argued, dual rate systems are violative of section 14 of the act, approval may not be given under section 15 of the act to an agreement to institute a dual rate system. Further, it is said, dual rate systems are necessarily unjustly discriminatory within the meaning of section 15 of the act in that prohibitions against "unjust discrimination," or similar words, historically forbid any difference in transportation costs not based on transportation conditions such as cost or value of services. For this reason, it is said that the phrase "unjust discrimination" forbids differences in rates based on competitive considerations alone.

Previous Judicial and Administrative Decisions

These contentions, frequently addressed to us and to our predecessors, as well as to the courts, have never been adopted by judicial or administrative bodies, as revealed by the reexamination of the decisions of those bodies which follows.

Dual rates were first considered by our predecessor, the Shipping Board, in *Eden Mining Co. v. Bluefields Fruit & S.S. Co.*, 1 U.S.S.B. 41 (1922). In that proceeding, commenced on complaint of a non-contract shipper, the Shipping Board found the dual rate practices of a single carrier

to be in violation of sections 16 and 17 of the act. The system there considered was analogized with the facts in *Menacho* v. *Ward*, 27 Fed. 529 (S.D.N.Y., 1886) where a carrier was restrained from charging higher rates to shippers who had patronized another carrier. The *Menacho* case did not involve a contract system, and it was the retaliation inherent in charging higher rates, rather than the difference in rates to shippers which was condemned. In the *Eden* case, no retaliation was found, but on the facts, the Shipping Board found violations of sections 16 and 17 of the act because of the difference in rates charged for identical service. Since the Board refused to find violations of paragraphs 3 and 4 of section 14 of the act, it is apparent that it did not consider the dual rate system unlawful per se under section 14. Indeed, the Board specifically stated, at page 45:

"... It should be here remarked, however, that we do not decide whether under that act (Shipping Act, 1916) the according of lower rates to those shippers who contract to confine their shipments to a certain carrier or carriers are lawful when based upon regularity of consignments, number of shipments, or quantity of merchandise furnished for transportation, as in the instant case no such question is presented for determination."

Thereafter, the Shipping Board commenced an investigation of the dual rate exclusive patronage contract system, as practiced in shipping conferences operating on trade routes having termini in the United States. That investigation, *Ex Parte 5 Contract Rate Investigation*, was discontinued as a formal proceeding upon objection of respondent carriers.[14] The proceeding was thereafter dismissed by

[14] Statement made by Bureau of Regulation at opening of hearing 2:30 P.M.—November 10, 1926:

"Out of consideration of the point of view expressed by the attorneys of the respondents this morning it is ruled that no orders will be entered in or as a result of this hearing having in view declaring any contracts the respondents or any of them may have made with shippers as illegal.

"This statement is not to be understood as conceding in any degree that the procedure we have here followed was not within the powers of the Board. Statements now made need not be under oath but the hearing will be continued for the purpose of receiving information from the respondents relative to the subject of the resolutions on which this hearing is based."

resolution of the Shipping Board,[15] without approving or disapproving of the practice as a whole or of specific applications thereof. No report in this matter was ever adopted or issued by the Shipping Board.[16]

[15] "The Shipping Board at a meeting on February 23, 1927, adopted the following resolution:

"*Whereas*, By resolutions of June 16, 1926, and July 13, 1926, the Board, under authority of Section 22 of the Shipping Act, 1916, entered upon a proceeding of investigation and inquiry in connection with the practice of carriers of charging 'contract' and 'non-contract' rates; and

"*Whereas*, At the outset of the hearing the Board on its own motion discontinued it as a formal hearing in the case, thenceforth proceeding informally, but without prejudice;

"*Resolved*, That the proceeding be, and the same is hereby dismissed."

[16] In another proceeding, the combined Dockets 725 and 751, counsel for Isbrandtsen attacked the Shipping Board's resolution of February 23, 1927 (footnote 15, *supra*) as "suppressed Docket," considers Public Counsel's discussion of the case as misleading, and apparently considers a draft report in the matter which was neither agreed on or adopted by the Shipping Board as an official report, as indicated by his statement which follows:

". . . Why did someone not dare to publish this extraordinary Report in *Ex Parte 5*? What follows demonstrates.

"This suppressed Docket, was unearthed for us, from the Archives. It reads like a melodrama."

After recital of the commencement of the investigation and its dismissal as a formal proceeding, counsel commented in the following manner on the unadopted draft report and the Shipping Board's dismissal of the matter without prejudice.

"Thus, the Board let go of the bear it had by the tail. It was, in fact, dragged away by the brute force of overwhelming, baseless arguments, advanced by Conference spokesmen.

"The same sort of 'brush-off' has continued right down to date. . . ."

"This atmosphere of obstruction surrounding the attempt of the Maritime Authorities to do their sworn duty, and enforce the law, has pervaded their offices ever since. No Board Members have yet summoned up enough courage, on their very own, to repulse this pressure and dissipate the deliberately beclouded atmosphere."

In the interest of accuracy, we report the facts. As stated, the only "Report" in this matter was a Shipping Board resolution, set out in footnote 15, *supra*. The draft report referred to by counsel for Isbrandtsen as a report of the Board was, as stated, unapproved and unadopted. Counsel refers to both the resolution of February 23, 1927, and the draft report as official reports of the Shipping Board without explanation of their great differences and without discussion of the fact that the draft report had no status as a report of Board action.

Counsel implied that the file in *Ex Parte 5* was unearthed through his diligence, despite efforts to suppress the file. Actually, Public Counsel learned of the report and at once made the results of his research available, in brief in Docket 730, to other interested parties. Further and persistent efforts by Public Counsel and other Board employees resulted in the location of the file in *Ex Parte 5* which had been misfiled by this agency prior to shipment to the National Archives. The entire file, in-

The system was first brought to the attention of the courts in *United States Nav. Co.* v. *Cunard S.S. Co.*, 39 F. 2d 204 (S.D.N.Y. 1929); *aff'd*, 50 F. 2d 83 (C.A. 2 Cir. 1931); *aff'd*, 284 U.S. 474 (1932). There a complaint alleged that the dual rate practices of defendant steamship lines were in violation of the Sherman Anti-Trust Act (15 U.S.C.A. 1-7, 15) and the Clayton Act (38 Stat. 730) and sought an injunction against such practices. It is significant that although differentials of 100 percent between contract and non-contract rates were alleged and the precedent of the *Eden* case was cited in support of arguments that agreements to charge dual rates could not legally be approved by the Shipping Board, the district court, nevertheless, granted a motion to dismiss on the ground that the matter involved questions within the exclusive primary jurisdiction of the Shipping Board. Complainants did not thereafter file a complaint with the Shipping Board.

The dual rate system was next considered by the Shipping Board in *Rawleigh* v. *Stoomvaart et al.*, 1 U.S.S.B. 285 (1933). There, where the issues were confined to the lawfulness of the contract rate practice per se, the Shipping Board held that dual rate practices *qua* practices do not contravene any of the regulatory provisions of the act. The *Eden* case was distinguished on the grounds that (1) the system considered in that case was practiced by a single carrier and denied the shipper a choice of carriers; (2) the contracts bound shippers to the carrier on both northbound and southbound shipments, although lower rates were afforded on southbound shipments only; and (3) the carrier gave no assurance against increase of rates without notice.

In the *Rawleigh* decision, the Shipping Board enunicated several basic considerations which are critical to any dis-

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cluding opinions of the agency general counsel, inter-office correspondence, and draft reports not approved by the Shipping Board members, was made available to counsel for Isbrandtsen. While some such material is not a matter of public record, the entire file was placed at the disposal of counsel for Isbrandtsen in order to offset any disadvantage to which he may have been put by virtue of the misfiling of *Ex Parte 5* by this agency.

cussion of the lawfulness of the dual rate system. It was stated, first, that although that system in itself is lawful, the spread between contract and non-contract rates can be such in amount as to constitute unlawfulness. Second, the Shipping Board stated that the system must be considered to have been approved in principle by the House of Representatives Committee on Merchant Marine and Fisheries of the 62nd and 63d Congresses (hereinafter "Alexander Committee"[17]), in its report (Alexander Report) and recommendations [18] which formed the foundation for ultimate passage of the act. Third, the Shipping Board considered that "the absence of materially different service before and since the inauguration of the practice" did not render the system unlawful and *that the necessity for protecting established services* justified, in that case, the adoption of the dual rate system.

The Secretary of Commerce in *Intercoastal Investigation, 1935*, 1 U.S.S.B.B. 400 (1935), in finding several dual rate systems to be unlawful under sections 16 and 18 of the act, stated, at page 452, that dual rate contracts "do not constitute a transportation condition as to warrant a difference in transportation rates." That language, clearly indicating illegality of the system per se is considerably weakened, however, by the following discussion, at p. 454 of the report of the Secretary of Commerce:

"It is clear that when intercoastal carriers were not required to file the rates charged shippers, but only their maximum rates, and carriers freely engaged in rate wars, the contract rate system served a useful purpose, but conditions have been changed by the Intercoastal Shipping Act, 1933, which requires that unless specifically authorized by the department, rates may not be changed on less than thirty days' notice to the public, and also authorizes the department either upon complaint or upon its own initiative to suspend proposed changes in the rates and enter upon hearings concerning the lawfulness thereof."

[17] Hon. Joshua W. Alexander of Missouri, Chairman.

[18] H. R. Doc. 805, 63d Cong., 2nd Sess., 1914.

An order issued in *Intercoastal Investigation, 1935 (supra)* condemning the contract rate system employed by the Gulf Intercoastal Conference was vacated and a new proceeding was commenced to determine the validity of a contract system in use in the Gulf-Pacific Coast trade. In his report in this proceeding, *Gulf Intercoastal Contract Rates*, 1 U.S.S.B.B. 524 (1936), the Secretary of Commerce found the contract system in question not justified by transportation conditions in the trade and unduly and unreasonably preferential and prejudicial in violation of section 16 of the act. The Secretary's finding of unlawfulness *under the facts before him* turned on his conclusion that there was no need for the use of the system in domestic commerce where rates are subject to Government control and, hence, no justification for the discrimination inherent in the system.[19] Significanfly, the report stated, at p. 529:

"In the *Rawleigh case* the evidence showed that the purpose and ultimate effect of the contract rate system as employed in that trade was to enable the carriers to approximate the volume of cargo that would move over their lines and to insure stability of rates and regularity of service. Operators of vessels in our foreign commerce may at any time and without warning be subjected to severe competition by tramp vessels of any nation. Unlike the intercoastal trade, there exists no statutory requirement that changes in rates be published thirty days in advance, nor is the department given any power to suspend such changes."

[19] Counsel for Isbrandtsen argues that language in our report on motion in Docket 759, *Anglo Canadian Shipping Co.* v. *Mitsui S. S. Co.*, 4 F.M.B. 535 (January 27, 1955), discredits the decision in *Gulf Intercoastal Rates (supra)*. In the *Mitsui* case prior to reversing an early decision in *Intercoastal Investigation, 1935 (supra)*, insofar as that decision found the practice of underquoting rates of competitors by fixed and lower differential to be in violation of the act, we stated:

> "At the outset, the fact that the intercoastal investigaion in 1935 was directed solely at practices existing in interstate as distinguished from foreign commerce is not significant."

In that case, we were required to consider the per se legality of a rate practice. The differing facts surrounding intercoastal and offshore shipping were immaterial to the legal construction of a statutory provision regulating both types of transportation. In *Gulf Intercoastal Rates (supra)*, however, the Secretary of Commerce, determined *as a fact* that regulation of the intercoastal trade under the Intercoastal Act, 1933, dispelled the need for a dual rate system in that trade.

The report thereafter resolved the apparent conflict within *Intercoastal Investigation, 1935 (supra)* and rejected the concept of per se illegality of the dual rate system, in stating, at p. 530:

"Whether any such (dual rate) system (in foreign commerce) is lawful is a question which must be determined *by the facts in each case.*" (Emphasis supplied.)

Respondents thereafter commenced an action in the U. S. District Court for the District of Columbia to set aside the order of the Secretary of Commerce requiring cancellation of the dual rate schedules considered in *Gulf Intercoastal Contract Rates (supra).* The bill was dismissed and the Secretary's action upheld by that court in a decision reported as *Swayne & Hoyt, Ltd. et al.* v. *U. S.*, 18 F. Supp. 25 (D.D.C. 1936). On appeal to the Supreme Court, the decree of the District Court was affirmed. *Swayne & Hoyt, Ltd. et al.* v. *U. S.*, 300 U.S. 297 (1936). The Supreme Court not only held that the Secretary's order was based on substantial evidence but also agreed with the Secretary's construction of the act, stating, at p. 304:

"In determining whether the present discrimination was undue or unreasonable the Secretary was called upon to ascertain whether its effect was to exclude other carriers from the traffic, and if so, whether, as appellants urge, it operated to secure stability of rates with consequent stability of service, and, so far as either effect was found to ensue, to weigh the disadvantages of the former against the advantages of the latter. This was clearly recognized in the report upon which the present order is based. It states that the danger of cut-throat competition was lessened by § 3 of the Intercoastal Shipping Act of 1933, and that the contract system tends to create a monopoly. In view of the assurance of reasonable rate stability afforded by the Act of 1933, the Secretary concluded that this was the real purpose of the contract rate."

In the same vein the Court stated, at p. 305:

". . . We think there was evidence from which the Secretary could reasonably conclude that there was little *need* for a contract rate system to assure stability of service." (Emphasis added.)

In *Phelps Bros. & Co., Inc.* v. *Cosulich-Societa Triestina D. Navigazione et al.*, 1 U.S.M.C. 634 (1936), the Maritime Commission found that the dual rate system of a conference was not unjustly discriminatory or unfair as between carriers if membership in the conference was open to independent carriers. The Commission further found that the system did not result in undue prejudice to shippers, since neither injury to shippers nor unreasonableness of the non-contract rates had been shown.

In 1939 the Maritime Commission considered the validity of the system in *Contract Routing Restrictions*, 2 U.S.M.C. 220. There, in an investigation commenced by the Maritime Commission, the system as employed by four outbound North Atlantic conferences was disapproved under section 15 of the act as unjustly discriminatory and unfair between the ports and between shippers and as detrimental to the commerce of the United States. The Commission followed the standards enunciated by the Supreme Court in *Swayne & Hoyt, Ltd. et al.* v. *U. S. (supra)*.

That the Commission considered *need* for the system to be a critical factor to such determination is evident from the following language at p. 226:

". . . There is nothing of record which would lead us to believe that the routing restriction in the contracts is vital to the maintenance of stability of service and rates."

Postwar administrative reports on dual rate practices continued to hold that system not unlawful per se. Such a determination was first made in this period in *Pacific Coast European Conference Agreement*, 3 U.S.M.C. 11 (1948). There the Commission measured the advantages and disadvantages of the dual rate system in the trade under consideration in the light of need for the system, stating in conclusion, at p. 17:

". . . The contract rate system is a *necessary practice* in this trade to secure the continuance of the conference; the frequency, dependability and stability of service; and the uniformity and stability of freight rates." (Emphasis supplied.)

In 1948 in the U. S. District Court for the Southern District of New York, Isbrandtsen sought to restrain the Eastbound and Westbound North Atlantic conferences from instituting a dual rate system and to set aside orders of the Maritime Commission which approved the basic agreements of those conferences, insofar as approval of the agreements authorized institution of dual rate systems. The injunction was granted conditioned on Isbrandtsen's diligent presentation before the commission of a complaint challenging the validity of the agreements. *Isbrandtsen Co., Inc. v. United States et al.*, 81 F. Supp. 544 (S.D.N.Y. 1948), appeal dismissed sub nom. *A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Co., Inc.*, 336 U.S. 941 (1949). In spite of the granting of the injunction, however, the Court's language, at p. 546, is significant in view of arguments directed to the Court by Isbrandtsen, urging that the system is illegal per se:

> "It may be that the 'exclusive patronage' provisions are prohibited by 46 U.S.C.A. § 812[2] and that the Commission is powerless to approve such provisions under 46 U.S.C.A. § 814. Very considerable doubt upon such a holding is thrown by *Swayne & Hoyt, Ltd.*, v. *U. S.*, 1937, 300 U.S. 297, 306, 307 and note 3, 57 S. Ct. 478, 81 L. Ed. 659, and by the legislative history of the statute, H.R. Doc. No. 805, 63rd Cong., 2nd Sess., 1914, 287-292.
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> "[2] Section 14 of the Shipping Act, 46 U.S.C.A. § 812, prohibits deferred rebates and retaliation by discriminating or unfair methods against a shipper because such shipper has patronized any other carrier."

Isbrandtsen thereafter filed a complaint with the Maritime Commission, seeking a declaration of unlawfulness under sections 14 and 15 of so much of the respondent's basic agreements as purported to authorize institution of dual rate systems. The complaint was heard by this Board, in its capacity as successor to the Maritime Commission, and the decision thereon reported in *Isbrandtsen Co.* v. *North Atlantic Continental Freight Conference et al.*, 3 F.M.B. 235 (1950). The Board dismissed the complaint,

inding (1) that the dual rate system is not illegal per se nder section 14(3) or other sections of the act and (2) hat the particular dual rate systems sought to be employed vere not unfair or unjustly discriminatory, in violation of he act or detrimental to the commerce of the United States.

Isbrandtsen's appeal from the Board's order was ustained in *Isbrandtsen v. United States*, 96 F. Supp. 883 (S.D.N.Y. 1951), affirmed by an equally divided court sub nom., *A/S F. Ludwig Mowinckels Rederi v. Isbrandtsen Co.*, 342 U.S. 950 (1952). It should be noted, however, that sbrandtsen, as well as intervener U. S. Department of Agriculture urged that the dual rate system is inherently discriminatory and retaliatory in violation of section 14(3) f the act and for that reason, among others, could not be pproved by the Maritime Commission (Board) under ection 15 of the act. The District Court refused to find the ystem unlawful per se in spite of the specific request. The ourt issued a permanent injunction, however, on the ground hat the Board had erred in approving a system of dual ates as not unjustly discriminatory and unfair in the face f an implicit finding that the differential or spread between ontract and non-contract rates had been arbitrarily arrived t.

On July 31, 1952, the Board served notice of its intention f adopting a procedural rule governing the initiation or odification of dual rate systems by conferences.[20]

Thereafter, on September 4, 1952, the North Atlantic ontinental Freight Conference advised the Board of its tention of instituting a dual rate system, effective October 1952.[21]

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[20] The rulemaking proceeding resulted in promulgation of General der 76.

[21] Although the North Atlantic Continental Freight Conference initially fused to hold the institution of the system in abeyance pending deter- nation of the reasonableness of the differential or spread between con- ct and non-contract rates, it later withheld the operation of the system the request of the Board. See *Contract Rates—North Atlantic Con- ental Freight Conference et al.*, 4 F.M.B. 98 (1952).

The Board thereafter commenced an investigation to determine whether the differential between contract and non-contract rates was unjustly discriminatory and in violation of the act. That investigation was discontinued by order of the Board following its report in *Contract Rates—North Atlantic Continental Freight Conference*, 4 F.M.B. 355 (1954), in which the differential between contract and non-contract rates was found on the facts to be not arbitrary or unreasonable nor unjustly discriminatory, nor in violation of the act. The decision did not constitute approval of the dual rate system in the trade in question, since other questions were reserved for later determination. Subsequent to commencement of the investigation of the *North Atlantic Continental Freight Conference's* proposed dual rates, the Board promulgated General Order 76. The General Order required submission of a statement, in applications for institution of dual rate systems, informing the Board of the amount of the spread, the effective date, and reasons for the use of the system in the particular trade involved, as well as transmitting copies of the contract. Accordingly, in the *North Atlantic* case, the Board specifically required compliance with General Order 76, nothwithstanding the decision, and reserved questions of per se unlawfulness of the system for determination in Docket No. 725, *Secretary of Agriculture v. North Atlantic Continental Freight Conference, et al.*

In *Far East Conference v. United States*, 94 F. Supp. 960 (D.N.J. 1951), rev'd. 342 U.S. 570 (1951), the Attorney General brought an action to enjoin defendants from using a dual rate system. A motion to dismiss on the ground that the Federal Maritime Board had exclusive primary jurisdiction was denied by the District Court. The Supreme Court reversed the district court although it had been argued by the Attorney General that the Board is without power to approve the dual rate system.

On December 24, 1952, this conference filed a statement under General Order 76 proposing to institute a dual rate

system. In protests against the proposed system Isbrandtsen and Justice requested a hearing, as well as suspension of the system pending completion of those hearings. The Board, by order dated January 21, 1953, granted hearing on the protests, but refused to suspend the institution of the system, stating that it did not appear that the differential between contract and non-contract rates was arbitrary, unreasonable or unjustly discriminatory or that the initiation of the system would be unjustly discriminatory or unfair or detrimental to the commerce of the United States or would cause irreparable harm to Isbrandtsen.

On petition of Isbrandtsen, the U. S. Court of Appeals for the District of Columbia granted a temporary stay of the Board's order of January 21, 1953 and later issued a temporary injunction against so much of the order as purported to approve institution of the dual rate system. The court thereafter set aside that much of the Board's order and enjoined the conference from effectuating the system prior to specific Board approval, holding that an agreement to institute a dual rate system is beyond the scope of authority of a provision in a basic conference agreement authorizing fixing of rates and may not be effectuated prior to specific Board approval under section 15 of the act. *Isbrandtsen Co., Inc.* v. *U. S.*, 211 F. 2d 51 (C.A.D.C. 1954), cert. denied 347 U.S. 990 (1954). Thereafter this proceeding was instituted for the purpose of considering the merits of the conference's application.

It has been the view of our predecessors that, while the charging of different rates for similar cargoes identically destined is prima facie discriminatory, a difference in rates may be justified where made necessary by competitive conditions existing in the trade in which the carriers are engaged. It is significant that neither the courts nor our predecessors have ever honored contentions that the system is illegal per se. They have uniformly refusd to find that (a) the system is necessarily retaliatory within the mean-

ing of section 14(3) of the act; (b) assuming retaliation, *any* discrimination is forbidden by section 14(3) of the act; (c) the words "unjustly discriminatory" as employed in section 15 of the act are words of act forbidding any discrimination and therefore prohibit Board approval of dual rate systems under section 15 of the act; or (d) the words "unjustly discriminatory" in section 17 of the act and/or "undue or unreasonable preference or advantage" in section 16 of the act prohibit any difference in ocean transportation charges not based on cost or value of service and therefore preclude Board approval of dual rate systems under section 15 of the act.

Alexander Report

Of particular persuasion to the conclusion that the dual rate system is *not* illegal per se is a footnoted remark of the Supreme Court in *Swayne & Hoyt, Ltd.* v. *U. S. (supra)*, stating that the Alexander Committee did not condemn the dual rate system.[22] That committee recognized, from the extensive investigation undertaken, the underlying instability of unregulated foreign commerce and the natural gravitation toward complete monopoly through elimination of weaker lines in recurring rate wars, agreements between carriers or consolidation of service under common ownership.[23]

Recognizing that monopoly was unavoidable in any event, the committee rejected the possibility of permitting unrestricted competition and chose the conference system as the least objectionable type of shipping monopoly, where subject to effective government supervision and if purged of its most objectionable features. Those objectionable features prior to 1916 were, first, the secrecy surrounding agreements between carriers and, second, certain unfair competitive methods then employed by the unregulated con-

[22] *Swayne & Hoyt, Ltd.* v. *U. S.*, *supra*, at p. 307, footnote 3.

[23] 4 Alexander Report 416.

ferences. The committee recommended that the first objection be met by requiring all conference agreements, understandings, or arrangements to be filed with, and approved by a government regulatory body.[24] The second objection was met by a recommendation for legislation prohibiting *specified* unfair practices including fighting ships, deferred rebates, and retaliation against shippers.[25] The recommended prohibitions were adopted by Congress in section 14 of the act.

Although the committee recognized the dual rate system as an existing means of meeting non-conference competition,[26] the use of that system was not included among the unfair competitive methods itemized at p. 417 of the report and condemned in the committee's legislative recommendation. On the contrary, in its summary of disadvantages of shipping conferences and agreements as reported by witnesses before the Alexander Committee, the Alexander report distinguished the contract system from the deferred rebate system in the following manner:[27]

"VII. *That deferred rebate systems are objectionable and should be prohibited for the following reasons:*

1 By deferring the payment of the rebate until three or six months following the period to which the rebate applies ship owners effectively tie the merchants to a group of lines for successive periods. *In this connection it is argued that the ordinary contract system does not place the shipper in the position of continual dependence that results from the deferred rebate system.*". (Emphasis supplied.)

While the foregoing distinction represents the testimony of witnesses before the committee, the committee's later specific prohibition against deferred rebates, and the absence of a specific prohibition against the use of "ordinary contract system" in the committee's recommendations indi-

[24] 4 Alexander Report, 419, 420.
[25] 4 Alexander Report, 421.
[26] 4 Alexander Report, 290.
[27] 4 Alexander Report, 307.

cates an adoption by the committee of the witnesses' testimony in this respect.

In support of the view that Congress intended, in the act, to prohibit only those practices specifically condemned, we offer the following testimony of Dr. Emory Johnson[28] in hearing on H.R. 14337:

"The theory in accordance with which the bill has been framed is that the law for the regulation of carriers by water shall state with precision what is required of carriers as regards their agreements, rates, and practices . . .

"The experience which the Interstate Commerce Commission has had in the regulation of carriers by rail shows the importance of including in an act, such as the one under consideration, a specific and detailed enumeration of the prohibitions and requirements imposed upon the carriers, and of the powers that may be exercised by the board intrusted with the administration of the act. A law less definite than the one proposed would almost certainly lead to controversy and litigation . . ."

It is no answer to state that the dual rate system was not in existence at the time of issuance of the Alexander Report. The references in the Report to the contract system fully meet this argument.

We see little merit in petitioners' arguments that the judicial history of "unjust discrimination," as revealed by decisions under section 2 of the Interstate Commerce Act (ICA)[29] and under section 90 of the English Railway

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[28] Dr. Emory R. Johnson, Professor of Transportation and Commerce, University of Pennsylvania, participated in drafting H.R. 14337.

[29] Section 2 of the Interstate Commerce Act provides:

"*Special rates and rebates prohibited.* If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful."

Clauses Consolidation Act of 1845 from which section 2 of the ICA was derived, makes unlawful any difference in rates charged to shippers for identical cargoes shipped over the same line for the same distance and under the same circumstances of carriage. If, as argued by petitioners, sections 14, 15 and 17 were indeed derived from comparable sections of the ICA in the same manner as section 16 of the act was patterned after section 3(1) of the ICA and section 2 of the English Railway and Canal Traffic Act of 1854, we would be influenced by that argument. The Supreme Court in *U. S. Navigation Co.* v. *Cunard (supra)* indicated, at p. 481, that " . . . the settled construction of the. . . . (ICA) must be applied to the . . . (Shipping Act, 1916) unless, in particular instances, there be *something peculiar in the question under consideration, or dissimilarity in the terms of the act relating thereto, requiring a different conclusion.*" (Emphasis supplied.)

Section 2 of the ICA, however, has no counterpart in the act. Section 4 of H.R. 14337 contained language[30] strikingly similar to section 2 of the ICA, but that language was deleted from the later and ultimately enacted bill, H.R. 15455. In the hearing on H.R. 14337 in which this deletion was considered, a witness recommended:[31]

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[30] Section 4, First, of H.R. 14337:

"Sec. 4. That it shall be unlawful for any common carrier by water, or other person subject to this act, either directly or indirectly—

"First. To charge, demand, collect, or receive from any person or persons by any special rate, rebate, drawback, or other device a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property subject to the provisions of this act than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like service in the transportation of a like kind of traffic under substantially similar circumstances and conditions: *Provided*, That nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the giving of reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National homes or State homes for disabled volunteer soldiers, and of soldiers' and sailors' homes, including those about to enter and those returning home after discharge, under arrangements with the board of managers of said homes."

[31] Hearings on H.R. 14337, 64th Cong., 1st Sess., at p. 136.

". . . We feel *the first part of section 4* would be very difficult to act under and to advise upon, and that section 5 embodies some matters that it is unnecessary, and therefore undesirable, at this stage of the development of the American merchant marine, to incorporate in the act. Instead of those sections we propose to redraft section 5 so as to include in it the substance of the matter of sections 4 and 5 *to the extent necessary to prevent injustice*, if you conclude that you must have regulation. As the revised paragraph is short, perhaps I had better read it:

'Sec. 5. That whenever, after full hearings upon a sworn complaint, the board shall be of opinion that any rates or charges demanded, charged, or collected by any common carrier by water in foreign commerce are unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors, the board is hereby empowered to alter the rates or charges demanded to the extent necessary to correct such unjust discrimination or prejudice, and to make an order that such carrier shall cease and desist from such unjust discrimination or prejudice.'" (Emphasis supplied.)

The words "to the extent necessary to eliminate injustice" clearly reveal the intent of the redrafters of section 5 to eliminate an absolute prohibition against discriminations in favor of a prohibition against only those discriminations which are unjust.

The witness' recommendations were, in part, adopted in H.R. 15455. While a revised section 5 was in substance followed in the first paragraph of section 18 of the bill (section 17 of the act), section 4 of H.R. 14337 was not eliminated. That section was substantially adopted, with the notable exception of the first paragraph, objected to by the witness, in section 17 of H.R. 15455 (section 16 of the act).[32]

Section 18 of H.R. 15455, based on the revised section 5 hereinabove set out, was conspicuously silent on the subject

[32] Dr. Emory R. Johnson, who had assisted in drafting the bill, described section 4, First, of H.R. 14337, at p. 27 of the House of Representatives Hearings on that bill, as containing an "absolute prohibition" against "a rebate or a drawback on a rate."

of special rates, into which category dual rates necessarily fall and bore little resemblance to section 2 of the ICA. We, therefore, consider decisions under section 2 of the ICA to be of no persuasion here.

As stated herein and in our Report on Motion in *Anglo Canadian Ship. Co., Ltd., et al.* v. *Mitsui*, 4 F.M.B. 535 (January 27, 1955), section 16 of the act was patterned after section 3(1)[33] of the ICA and section 2 of the (English) Railway and Canal Traffic Act of 1854, both of which earlier provisions forbade granting to shippers any preference or advantage which is undue or unreasonable.

In decisions under section 3(1) and 4 of the ICA, carrier competition has been considered a factor to be weighed in justification of a prima facie discrimination or preference. *Eastern Central Motor Carriers Ass'n.* v. *United States*, 321 U.S. 194 (1944); *Texas and Pacific Ry.* v. *United States*, 269 U.S. 627 (1933); *I.C.C.* v. *Alabama-Midland Ry. Co.*, 168 U.S. 144 (1897).

In the *Eastern Central* case the Supreme Court reviewed a determination by the Interstate Commerce Commission (ICC) upheld by a District Court, that a minimum weight requirement for volume discount, not based on truckload capacity, was both unreasonable and unjustly discriminatory although the requirement was adopted by a motor carrier in order to make its rates competitive with railroad rates. In reversing the lower court's decision, the Supreme Court took the view that both competition and cost of operation are factors which must be taken into consideration in determining whether a discrimination or preference is unlawful. The case is particularly significant because

[33] Section 3, par. (1)
"*Undue preferences or prejudices prohibited.* It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

of its recognition of two considerations. First, it recognized that principles evolved in the regulation of railroads in competition only with other railroads have a limited applicability to circumstances where different modes of transportation are in competition with each other. Second, it recognized the inseparability of the ICC's dual function of regulator and coordinator.

The problems presented to the Supreme Court in the Eastern Central case are highly analogous to the instant problem. While ratemaking has been closely tied to cost factors generally, those cost factors are substantially alike to all domestic carriers within an industry. Where cost factors differed between rail carriers and motor carriers and a motor carrier based its rates on competitive considerations, the Supreme Court refused to base its decision as to the reasonableness of those rates on cost factors alone. In water transportation in foreign commerce, cost factors likewise vary between carriers of different national registry. Obviously the differences in costs of operation require carriers to take competition, as well as costs of operation, into consideration in fixing rates.

We consider dual rate contracts to be, in nature, highly analogous to volume discounts; although a shipper does not promise to ship a specific amount of cargo, the expression of his obligation in terms of percentages gives the conference lines as great an assurance of a basic core of cargo on which to rely in planning future vessel requirements as that which would result from a promise to ship a specific amount of cargo within a given period. The parties contract with awareness of the past and probable future needs of the shippers and those needs are identical, whether or not specified. Further, the volume discount nature of the dual rate contract is free from the discrimination in volume contracts contemplated in section 14, Fourth, of the act since the identical discount is available to all shippers, large or small. It was this type of contract which our predecessor, in the *Eden Mining* case *(supra)* took

pains to distinguish in condemning a particular dual rate system.

But even if we should assume that dual rate contracts are not assured volume discounts and if we should assume that such contracts would be violative of the principles of the ICA, we nevertheless must consider decisions under section 2 of the ICA inapplicable here. Problems relating to foreign commerce, as hereinbefore discussed in connection with *Gulf Intercoastal Rates* and *Swayne & Hoyt et al.* v. *United States*, create a peculiar difference in the questions to be considered, within the meaning of *U. S. Navigation Co.* v. *Cunard (supra)*; for regulation of rates in domestic commerce; or the ability to regulate such rates, dispels the need for offsetting competitive ratemaking measures.

By the Transportation Act of 1920, the ICC was granted the power "so to fix rates as to keep in competitive balance the various types of carrier and to prevent ruinous rate wars between them." *New York* v. *United States*, 331 U.S. 284, 348 (1947). No power to fix rates in foreign commerce was granted to this Board. Further, unlike domestic transportation, where a certificate of convenience and necessity must be obtained by a new carrier prior to entry into a service, ocean carriers are entirely free to enter any field of competition. These peculiar differences between domestic and foreign transportation render inapplicable certain principles enunciated under the ICA in connection with domestic transportation, particularly where concerned with problems relating to one mode of transportation alone.

SECTION 14(3)

Petitioners further argue that the Board has no authority to approve a dual rate system under section 15 of the act, since such systems are necessarily unlawful under section 14(3) of the act. They argue, first, that the dual rate system is necessarily retaliatory against non-signing shippers,

and, second, that the absence of the modifying word "unjustly" preceding the word "discriminatory" makes unlawful *any* retaliation by discriminatory methods and not merely those methods which are "unjustly discriminatory." As to the first argument, we cannot improve on an answer previously made to this contention in *Isbrandtsen Co.* v. *North Atlantic Continental Freight Conference et al.*, 3 F.M.B. 235, 242 (1950), where it was said:

" . . . To retaliate is defined in Webster's New International Dictionary, 1945 Unabridged Edition, as 'to return like for like' or 'evil for evil'. Retaliation perhaps connotes the idea of vengeance . . . We cannot view the adoption of the dual rate system or the charging of a higher rate to a shipper who voluntarily declines to give his exclusive patronage as a 'retaliation'. The higher rate cannot be said to be charged as a retaliation for 'patronizing any other carrier.' It is charged because the shipper does not sign the contract, regardless of whether or not he patronizes any other carrier. A non-signing shipper who does not patronize a non-conference carrier is treated as harshly as a non-signing shipper who ships partially or exclusively with such a carrier."

The second argument is equally untenable.[34] As stated in *U. S.* v. *Wells Fargo Express Co.*, 161 Fed. 606, 610 (1908), "It is difficult to conceive of the terms 'discrimination', 'prejudice' or 'disadvantage' as not associated with what is unjust, unreasonable or undue."

From the administrative precedents and judicial decisions hereinbefore discussed and from the legislative history of the act, we necessarily conclude that the dual rate system is not in itself unlawful. The lawfulness or unlawfulness of a particular dual rate system depends directly on the facts adduced in a hearing on the merits of the use of that system in the particular trade and is judged by the standards announced by the Supreme Court in

[34] Assuming as argued by Isbrandtsen that the phrase "unjust discrimination" appearing in sections 15 and 17 of the act renders dual rate systems illegal per se, this argument is totally unnecessary.

Swayne & Hoyt v. *United States (supra)*, repeated here for emphasis:

"In determining whether the present discrimination was undue or unreasonable the Secretary was called upon to ascertain whether its effect was to exclude other carriers from the traffic, and if so, whether . . . it operated to secure stability of rates with consequent stability of service, and so far as either effect was found to ensue, to weigh the disadvantages of the former against the advantages of the latter."

We construe this language, as have our predecessors, as requiring us to consider the reasonableness of the prima facie discrimination[35] against shippers inherent in dual rate systems in the light of the necessity for that discrimination in order to effectuate the Congressional plan for shipping in the foreign commerce of the United States. As previously indicated herein Congress chose the controlled monopoly of the conference system over the alternative of the uncontrolled monopoly naturally resulting from unregulated cutthroat competition among ocean carriers.[36] In *Swayne & Hoyt* v. *United States (supra)*, the Supreme Court recognized *necessity* for the use of a "dual rate system" in order to assure the continued benefits of a regulated conference system as a standard for determining the reasonableness or justice of the prima facie discrimination resulting therefrom, in stating at p. 305:

". . . We think there was evidence from which the Secretary could reasonably conclude that there was little *need* for a contract rate system to assure stability of service." (Emphasis supplied.)

It is inconceivable that Congress in selecting a regulated conference system in preference to unregulated cutthroat competition, would have outlawed a system which in many cases is the sole method by which a conference may retain a sufficient amount of cargo to assure its continued exist-

[35] *Swayne & Hoyt* v. *United States (supra)* at p. 303.

[36] See discussion in 4 Alexander Report, 417-421.

ence. To state that Congress implicitly condemned the dual rate system is to credit Congress with legalizing a conference system without means of self-protection against rate-cutting independent competitors and with little hope of survival.

Obviously Congress did not intend to allow ocean shipping to gravitate into the unregulated monopolistic state sought through the act to be avoided. Such an incongruous result is clearly possible however, if we assume that conferences may not in any circumstances employ dual rates as protection against non-conference competition.

We conclude that the dual rate system is, in itself, lawful, and does not require our disapproval unless, under the facts adduced in a particular case, the system would be unjustly discriminatory and unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, would operate to the detriment of the commerce of the United States, or would be in violation of the act.

In the matter specifically before us, the conference's General Order 76 filing raises two issues of fact, viz: (1) Is the initiation of a dual rate system necessary or required, as a competitive measure, to insure or restore stability of rates and service to shippers in the trade and (2) assuming an affirmative determination of the first question, is the differential or spread reasonable, judged by its probable effect on shippers[37] and on the competitive position of the independent carrier, Isbrandtsen?

We consider the inauguration of a dual rate system to be a necessary competitive measure to offset the effect of non-conference competition in this trade. Non-Japanese conference carriers who, in 1949, carried 88 percent of the total liner cargo moving in the trade, have seen their participation in the total traffic reduced to 25 percent in 1952 because of

[37] The term "shippers" for the purpose of this report includes exporters, importers, or others who may control shipments in this trade.

the severe rate-cutting competition of Isbrandtsen and because of the resumed operations of Japanese carriers. In the same year Isbrandtsen and Japanese-flag lines carried 26 percent and 49 percent respectively of the total liner cargo in the trade. In that year, the last full year under closed rate conditions and the first year of full renewed participation by Japanese-flag carriers, seven[38] conference, non-Japanese lines collectively carried less cargo on 132 sailings than did Isbrandtsen on 24 sailings, despite the fact that Isbrandtsen did not serve the entire range of ports of discharge in this trade and did not offer reefer space or special silk lockers, as did many of the conference vessels.[39]

Institution of a dual rate system would have little effect on the overtonnaged conditions of the trade. Conversely, a reduction in the amount of conference sailings or other solution to the overtonnaging problem would not mitigate the conference's need to meet the competition of Isbrandtsen in order to obtain for its members a greater participation in the cargo moving in the trade. Indications that Isbrandtsen, prior to opening of rates by the conference, had planned to increase its service to three sailings or perhaps four sailings per month leads to the inevitable conclusion that under closed single rates, Isbrandtsen's participation in the trade would be still further increased, most probably at the expense of the non-Japanese conference lines who do not enjoy as an offsetting factor the nationalistic preference of Japanese shippers.

The dual rate system by creating a basic core of cargo on which the conference can rely for the period of the contracts, will eliminate, for that period, the pressure on conference lines to reduce rates to meet Isbrandtsen's lower rate competition and will thereby create greater stability of rates and

[38] Excluding the Westbound service of APL and the Gulf coast service of Lykes.

[39] In this regard, we note that Isbrandtsen's lack of reefer space or silk lockers is voluntary and that Isbrandtsen has published rates for the carriage of silk and silk products in this trade.

service, facilitate forward trading by shippers, and decrease the threat of rate wars.

Generally, we consider the 9½ percent spread between contract and non-contract rates to be reasonable, with minor exceptions as hereinafter noted. The spread is, as to those commodities capable of being carried by both Isbrandtsen and conference vessels, large enough to furnish protection to the conference lines against inducements to shippers offered by Isbrandtsen and small enough to enable Isbrandtsen to remain competitive with the conference. While we find it probable that Isbrandtsen will retain 10 percent or more of the cargo moving in the trade as against the 26 percent carried by it in 1952, yet when compared with the lesser average percentage which will be enjoyed by the conference lines, Isbrandtsen's 10 percent would be at least an equitable share of the trade. The increased share of cargo which will be received by the conference will more than offset any loss of revenue attributable to the 9½ percent discount and will result in reducing fixed unit transportation costs. The cost reduction in turn may result in benefit to both contract and non-contract shippers by enabling the conference lines to reduce freight rates to all shippers.

While dissatisfaction has been voiced by several shippers as to some effects of the spread, shippers generally viewed the spread as not unreasonable.

While a shipper has urged that the spread is too high on commodities of low value in that the 9½ percent differential on those comodities may represent a shipper's margin of profit, of those commodities, only Chirstmas tree ornaments, porcelain, and some bamboo ware were identified, and no alternative spread was suggested. Further, as stated, the shipper indicated that a lower spread on such commodities, while desirable, is totally impractical and does not render an overall spread of 9½ percent unfair or unreasonable.

The fact that Isbrandtsen vessels in this trade discharge only at U. S. North Atlantic ports and do not also call at

U.S. Gulf ports is not of itself overly coercive of and unfair to those shippers who require service to both coasts. First, such shippers could reduce overall shipping costs, in the absence of a preponderantly greater volume of cargo to the Gulf, by shipping via Isbrandtsen vessels to North Atlantic ports and via conference vessels, at non-contract rates, to Gulf ports. While it is true that in such circumstances the non-signing shipper might be at a competitive disadvantage on Gulf shipments, assuming that ocean transportation costs are a significant part of the landed value of the items shipped, yet, on the cargo moving to North Atlantic ports the contract shipper would be at a greater competitive disadvantage as compared with a non-signing shipper who enjoys the customary lower rates of the independent carrier. To realize that the preponderant volume[46] of cargo in the conference trade moves to North Atlantic ports rather than to Gulf ports is to recognize the insignificance of any coercion that might be effected on non-signing shippers by the dual rate system here proposed. Further, there can be no doubt that the Atlantic and Gulf coasts are competitive for the trade of overland points. *Inland Waterways Corp.* v. *Certain Freight Companies*, 1 U.S.M.C. 653 (1937); *In the Matter of Agreement No. 6510*, 1 U.S.M.C. 775 (1938); 2 U.S.M.C. 22 (1939); Johnson & Huebner, Principles of Ocean Transportation, pp. 126, 127 (1929).

We find no coercion on those shippers who require more frequent service than Isbrandtsen's fortnightly sailings in view of Isbrandtsen's announcement, prior to the rate war, of a proposed substantial increase in frequency of its service.

We find no need, however, for any spread on reefer cargo since, as stated, Isbrandtsen vessels are not equipped with refrigerated space and are not, therefore, competitive with conference vessels for reefer cargo.

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[46] An illustrative period of record indicates that Atlantic carryings outnumber Gulf carryings by an approximate 10 to 1 ratio.

As hereinabove indicated, we do not consider the spread or the system to be unjustly discriminatory or unfair as between carriers. Isbrandtsen argues that the system and the 9½ percent spread between contract and non-contract rates are not measures necessary to meet Isbrandtsen's competition and thus are unreasonable. This is true, it is urged, because the conference is able through periodic uniform rate reductions to eliminate Isbrandtsen as a competitor without the necessity for institution of dual rates. We are unimpressed with this argument; even assuming that the conference's more cumbersome rate-making processes are adaptable to such a method of competition, success in eliminating Isbrandtsen through this type of rate warfare would be accomplished at the price of simultaneous elimination of those American-flag lines, present or potential, whose operating costs parallel those of Isbrandtsen. Such a result would be repugnant to the ultimate purposes stated in the title of the act which include "the purpose of encouraging, developing, and creating a naval auxiliary and naval reserve and a merchant marine to meet the requirements of the commerce of the United States with . . . foreign countries." The dual rate system here, on the other hand, is consistent with that purpose. The spread between contract and non-contract rates in the proposed system, based in part on the percentage by which Isbrandtsen most frequently underquotes conference tariff rates will reasonably enable the conference to meet Isbrandtsen's competition *without*, as in the method of uniform conference rate reduction preferred by Isbrandtsen, eliminating a *single* American carrier from the trade.

The dual rate system here proposed will not result in detriment to commerce of the United States. The system will decrease the probability of rate wars and their disastrous consequences in this trade and will benefit shippers by tending to insure a greater measure of stability of rates than has heretofore existed in the postwar period. While Isbrandtsen's share of the traffic may, as stated, be reduced,

we do not anticipate that such increase in conference controlled traffic will result in the traditional evils associated with monopoly. The continued participation of Isbraindtsen in the trade, as well as the existence of strong shipper organizations, stand as a strong deterrent against exorbitant freight rates and other objectionable monopolistic practices. In any event this Board has full power over those rates of conference carriers in foreign commerce which are detrimental to the commerce of the United States.

Various of the provisions of the contract form proposed for use in this trade require particular examination, for as hereinbefore indicated, shipper witnesses in this proceeding were unfamiliar with the contract and had not been consulted by the conference in its preparation.

We consider articles 1 and 6 of the form contract to be unacceptable as presently drafted despite the conference explanation that article 6 constitutes a modification of article 1 and is controlling over the earlier provision. The two articles under any construction are objectionable, because as drafted the receiver under the f.o.b., f.a.s. shipments may obtain contract rates so long as he patronizes exclusively conference vessels but once he ships non-conference, he may not thereafter receive contract rates. This provision is objectionable because such a receiver obtains the benefits of contract rates without signing a shipper contract whereas all other non-signers are charged the full non-contract tariff rates and, therefore, unlike treatment is being accorded non-signers. Such f.o.b. receiver should receive contract rates only if he is a contract signatory.

We approve the contract form insofar as it purports to cover c.i.f. and c. & f. sales. Except as stated below, we disapprove the contract form insofar as it purports to cover f.o.b. or f.a.s. sales. Irrespective of the terms of the sales agreement, in any instance where the contract signer appears as shipper in the bill of lading, such fact alone auto-

matically requires that the shipment move on conference vessels. In the situation where the contract signer appears as shipper in the bill of lading, it is no mere matter of form to say he is the shipper in fact. In c. & f. or c.i.f. sales the problem does not arise, because there the contract signer is in fact the shipper, but in f.o.b. or f.a.s. sales we deem it undesirable to have the answer to this problem turn on the complicated questions of law as to risk of loss or when title passes in determining when a given shipment is or is not covered by the shipper's agreement. We deem it highly desirable that simple tests and standards be applicable.

To this end we consider that the contract should indicate that the person indicated as shipper in the ocean bill of lading shall be deemed to be the shipper. We do not intend, however, to preclude shipment by an exporter as agent for the buyer, where the exporter only renders assistance at the buyer's request and expense, in obtaining the documents required for purposes of exportation.

The significance of articles 1 and 6 is readily apparent when it is realized that over 70 percent of the liner cargo in this trade moves under f.o.b. (or f.a.s.) terms.

In this regard it will readily be recognized that participation by Isbrandtsen in this trade greater than that anticipated by the parties must be forecast, in view of the freedom of the Japanese exporter to sell and ship under f.o.b. terms.

Article 3 incorporates all rules, regulations, terms and conditions in the conference tariff, although such provisions have not been submitted to us along with the conference General Order 76 statement. We will forbid the incorporation of any such provisions which, without our approval, (a) may operate directly or indirectly to change the amount of the spread, or (b) to impose on contract shippers additional requirements not imposed on non-contract shippers.

In article 5, fifty percent of the amount of freight which the shipper would have paid if a given shipment moved via

conference vessel is recoverable by the conference as liquidated damages in the event of shipper breach by patronizing a non-conference carrier. While there is no corresponding provision for liquidated damages to be paid in the event of carrier failure to provide adequate service, in our opinion, no such provision is necessary. The failure to specify the amount of damages in such circumstances is, in our view, nothing more than a recognition by the parties that damages may readily be ascertained, in the event of conference breach, on submission of the matter to arbitration, in accordance with article 10.

While a prominent shipper group recommended that liquidated damages in the event of shipper breach be limited to 20 percent of the freight which would have been earned, we have no basis for finding that a 50 percent payment would be a penalty, rather than an assessment of liquidated damages, since we have not been sufficiently apprised here of the relationship between dead freight and tariff rates.

In summary:

Applying the tests of *Swayne & Hoyt, Ltd.* v. *United States (supra)* and balancing the foreseeable advantages of the proposed dual rate system against the foreseeable disadvantages, we find that the prima facie discrimination against shippers and the increased tendency toward monopoly of service are outweighed by the benefits to be derived from the system. Those advantages we find to be (a) greater stability and uniformity of rates than has existed since the outbreak of the rate war, and the resultant benefit to shippers and receivers in this trade, (b) the ability of the conference carriers through reduced unit transportation costs to provide lower rates to all shippers and/or to put improved, more efficient tonnage on berth. While the possible reduced utilization of Isbrandtsen's services by shippers is, to some extent, disadvantageous to the efforts of shippers to have rates maintained at a reasonably low level, yet the continued

existence of Isbrandtsen as an effective competitor and the existence of strong shipper groups insures conference consideration of shipper needs and desires. In this regard, it must be noted, that Isbrandtsen's participation in this trade, prior to the outbreak of the rate war, had little practical effect on the level of rates, since conference rate increases were consistently followed by Isbrandtsen rate increases. This phenomenon is largely explained by the fact that the conference, however keenly aware of Isbrandtsen's rate competition, avoided rate reductions until March 1953 in the hopes that a rate war, by uniform rate reductions or by open rates, could be avoided by institution of a dual rate system. Put otherwise, the conference, by failing to reduce rates uniformly ,elected to realize high revenues from a lesser amount of cargo over lower revenues from a greater amount. The economic pressure to reduce rates, however, remained.

Aside from their opposition to the proposal to initiate dual rates, interveners have argued that the relationship between the conference and the Trans-Pacific Freight Conference of Japan has amounted to effectuation of an unapproved agreement between carriers in violation of section 15 of the act. While it is true that identical actions have been taken at similar times, that the conferences meet at the same address, and that the membership for the greater part is common, we have been presented with no evidence tending to show the existence of any agreement, express or implied, which, while unapproved, falls within the prohibitions of section 15.

The conference has not considered its General Order 76 filing as a filing for approval under section 15 of the act. The statement was filed, however, prior to the decision of the Court of Appeals for the District of Columbia Circuit in *Isbrandtsen Co., Inc.* v. *United States et al.*, 211 F. 2d 51 (1954) where that court held that the agreement of this conference to initiate a dual rate system had never received

our approval or the approval of our predecessors. For this reason we must consider nunc pro tunc the statement to be a filing for approval under section 15 of the act. To hold otherwise would be to treat this entire proceeding as a nullity.

We find:

(a) The application of the conference to initiate a dual rate system on non-refrigerated cargo to move in the trade from Japan, Korea, and Okinawa to United States North Atlantic Coast and Gulf ports is approved, since we have not found the proposed system to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports, or between exporters from the United States and their foreign competitors, likely to operate to the detriment of the commerce of the United States, or in violation of the act. The approval granted is contingent on conference amendment of the proposed agreement with shippers to conform with ~~our opinion~~ herein.

(b) The conference proposal to charge dual rates on refrigerated cargo moving in the trade between Japan, Korea and Okinawa to United States Gulf coast and Atlantic coast ports is disapproved as unjustly discriminatory and unfair as between shippers.

(c) No agreement between this conference and the Trans-Pacific Freight Conference of Japan in violation of section 15 of the act has been established.

Our approval of the conference's application to institute a dual rate system in this trade is effective commencing on January 1, 1956.

A. J. Williams
Secretary

December 12, 1955

RULE 236 OF GENERAL ORDER 76

(Title 46-Shipping-Chapter II-Federal Maritime Board, Maritime Administration, Department of Commerce-Part 236-Steamship Conferences Using Contract/Non-Contract Rates-Code of Federal Regulations.)

Whereas, the Federal Maritime Board published in the Federal Register on July 31, 1952 (17 F. R. 7020) a notice of proposed rule of procedure pertaining to the use of contract/non-contract rates by steamship conferences to become effective as of a date to be specified in such rule if adopted by the Board; and

Whereas, the Board granted interested parties an opportunity to submit written statements and comments on said rule within 30 days of the publication of said notice, and thereafter at the request of interested parties extended the time therefor until September 19, 1952; and

Whereas, the Board granted interested parties, at their request, an opportunity to be heard at an oral argument before the Board on October 16, 1952; and

Whereas, after consideration of the written statements and comments submitted and oral argument as aforesaid, and in the light thereof, the Board has adopted the rule of procedure hereinafter set forth; and

Whereas, in view of the time and opportunity to be heard afforded all interested parties, and the necessity for prompt and uniform treatment of steamship conferences using contract/non-contract rates, the Board finds that it is in the public interest to make said rule effective upon the publication thereof.

Now, therefore, it is hereby ordered, that pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C. 814), section 204 of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1114), and sections 3 and 4 of the Administrative Procedure Act (5 U.S.C. 1002, 1003), the following rule of

procedure shall be effective as of the date of publication in the Federal Register:

1. Steamship freight conferences having in effect contract/non-contract rates on the effective date of this rule shall file with the Federal Maritime Board within 90 days after the effective date of this rule a statement containing:

(a) The date when contract/non-contract rates were first established by the conference;

(b) The amount of the spread or differential between current contract/non-contract rates stated in terms of percentages or dollars and cents;

(c) The reasons for the use of the current contract/non-contract rates in the particular trade involved, and the basis for the current spread or differential between such rates; and

(d) Copies of the form of all contracts pertaining to such current rates.

2. Steamship freight conferences now or hereafter having in effect contract/non-contract rates shall file with the Federal Maritime Board at least 30 days prior to initiating any increase in the spread or differential between such rates, a statement containing:

(a) The amount of increase in the spread or differential and the total proposed spread or differential in terms of percentages or dollars and cents;

(b) The effective date;

(c) The reasons for the increase in the spread or differential; and

(d) Copies of the form of any changed contract provisions relating to such increase in spread or differential.

As used in this paragraph 2, an "increase in the spread or differential" shall be deemed only to mean an increase

in the percentage of a spread or differential between rates if such spread or differential has been established in terms of percentages, or an increase in the dollars and cents amount of the spread or differential if such spread or differential has been established in terms of dollars and cents.

3. Steamship freight conferences proposing to establish contract/non-contract rates to become effective after the effective date of this rule shall file with the Federal Maritime Board at least 30 days prior to the initiation of such rates, a statement containing:

(a) The amount of the spread or differential in terms of percentages or dollars and cents;

(b) The effective date;

(c) The reasons for the use of contract/non-contract rates in the particular trade involved, and the basis for the spread or differential between such rates; and

(d) Copies of the form of all contracts pertaining thereto.

Contract/non-contract rates for a commodity as to which such rates have previously been in effect and discontinued shall not be deemed to be newly established contract/non-contract rates within the meaning of this paragraph 3 if such contract/non-contract rates are again made effective by the conference without increase in spread or differential and within 12 months after discontinuance.

4. Upon a showing of good and sufficient cause, the time within which to file the foregoing statements may be

shortened or extended, or such other action taken with respect thereto, as the Board may consider to be in the public interest and not detrimental to the commerce of the United States.

[*A copy of the Exclusive Patronage Contract was attached to the Petition for Review. It is printed herein as Exhibit J attached to the Statement of the Conference filed under General Order 76.*]

Order

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 20th day of December A.D. 1955.

No. 730

IN THE MATTER OF THE STATEMENT OF JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE FILED UNDER GENERAL ORDER 76

This case being at issue and having been duly heard and submitted by the parties and full investigation of the matter and things having been had and the Board on December 12, 1955, having made and entered of record a report stating its decision and conclusions thereon, which report is hereby referred to and made a part hereof;

It is ordered, That the Agreement embodied in and constituted by the aforesaid Statement filed by the Japan-

Atlantic and Gulf Freight Conference as aforesaid, be, and the same is hereby, in all respects, approved under the provisions of section 15 of the Shipping Act, 1916, as amended, excepting that said contract system shall not apply to shipments which are made on an F.O.B., F:A.S., or ex godown basis or to the transportation of cargoes in refrigerated compartments; and to that end;

It is further ordered, That as a part of the said contract system, the shipper's contract to be employed by said Japan-Atlantic and Gulf Freight Conference shall be in the form of Exhibit J attached to and constituting a part of the aforesaid Statement, modified as follows:

A. Article 1 thereof shall be modified to read as follows:

"1) The Shipper agrees to forward or to cause to be forwarded by vessels of the Carriers all shipments, other than cargoes to be transported in refrigerated compartments (reefer cargo), made directly or indirectly by him, his agents, subsidiaries, associated or parent companies, from Japan, Korea and Okinawa to United States Gulf ports and Atlantic Coast ports of North America, whether such shipments are made C.I.F., or C. & F.; provided, that for all purposes of this agreement, the person indicated as shipper in any ocean bill of lading shall be deemed to be the shipper of the goods described in the bill of lading."

B. Article 3 shall be stricken therefrom.

C. Article 6 shall be stricken therefrom.

D. The remaining paragraphs shall be numbered consecutively, and

It is further ordered, That the approval hereby granted shall be effective January 1, 1956, at 12:00 noon Eastern Standard Time.

By the Board.

A. J. Williams
Secretary

Order

At a Session of the FEDERAL MARITIME BOARD, held at its offices in Washington, D. C., on the 10th day of January A.D. 1956

No. 730

IN THE MATTER OF THE STATEMENT OF JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE FILED UNDER GENERAL ORDER 76.

Whereas, This matter has been at issue, has been duly heard and submitted by the parties, and full investigation of the matter has been had, and the Board, on December 12, 1955 has made and entered of record a report stating its decision and conclusions thereon, which report is hereby referred to and made a part hereof; and

Whereas, The Board, by order served on December 21, 1955, approved under the provisions of section 15 of the Shipping Act, 1916, as amended, the Agreement embodied in and constituted by the aforesaid statement filed by the Japan-Atlantic and Gulf Freight Conference with exceptions as specified in said order; and

It appearing, That the exceptions to the aforesaid approval granted in said order require clarification and for good cause appearing;

It is ordered, That the order of the Board heretofore served in this Docket on December 21, 1955 be, and it is hereby, superseded and cancelled; and

It is ordered, That the Agreement embodied in and constituted by the aforesaid Statement filed by the Japan-Atlantic and Gulf Freight Conference as aforesaid, be, and the same is hereby, in all respects, approved under the provisions of section 15 of the Shipping Act, 1916, as amended,

excepting that said contract system shall not apply to shipments which are made on an F.O.B., F.A.S., or ex godown basis unless the person, whether seller or buyer, named as shipper in the ocean bill of lading is a contract signatory, or to the transportation of cargoes in refrigerated compartments; and to that end

It is further ordered, That as a part of the said contract system, the shipper's contract to be employed by said Japan-Atlantic and Gulf Freight Conference shall be in the form of Exhibit J attached to and constituting a part of the aforesaid Statement, modified as follows:

A. Article 1 thereof shall be modified to read as follows:

"1) The Shipper [contract signatory] agrees to forward or to cause to be forwarded by vessels of the Carriers all shipments, other than cargoes to be transported in refrigerated compartments (reefer cargo), made directly or indirectly by him, his agents, subsidiaries, associated or parent companies, from Japan, Korea and Okinawa to United States Gulf ports and Atlantic Coast ports of North America, whether such shipments are made C.I.F., or C. & F., if the Shipper is the Seller or are made F.O.B., F.A.S., or ex godown if the Shipper is the Receiver; provided, that for all purposes of this agreement, the person indicated as shipper in any ocean bill of lading shall be deemed to be the shipper of the goods described in the bill of lading."

B. Article 3 shall be stricken therefrom.

C. Article 6 shall be stricken therefrom.

D. The remaining paragraphs shall be numbered consecutively. This order shall be effective on the date of issuance.

By the Board.

(SEAL)

A. J. Williams
Secretary

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ISBRANDTSEN COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA and
FEDERAL MARITIME BOARD,
Respondents,

No. 13027

and

JAPAN-ATLANTIC and
GULF FREIGHT CONFERENCE ET AL,
Intervenor Respondents

Motion for the Remanding of Order To the Federal Maritime Board

Petitioner, herein, Isbrandtsen Company, Inc., hereby moves this Court to remand the Order of the Federal Maritime Board, dated January 10, 1956, served on January 11, 1956 (which is attached hereto as Exhibit A) to the Board for a proper recitation of the circumstances and reasons prompting it and for proper findings of fact pursuant to the requirements of the Administrative Procedure Act.

In support of this Motion, Petitioner represents:

1. The circumstances surrounding the present administrative proceeding before the Federal Maritime Board are an incredible commentary on the Board's method of conducting such proceedings, required to be held pursuant to the provisions of the Administrative Procedure Act. Some of these circumstances are as follow:

A. About one (1) month prior to the Board's original decision or Report of December 12, 1955, Petitioner herein had requested the Chairman of the Board to stay voluntarily the effectiveness of any Order that the Board might enter in this and other exclusive patronage contract rate proceedings, then pending before it, for thirty (30) or forty-

five (45) days after such Report or Order had been issued so as to afford Petitioner herein a reasonable and sufficient time to proceed into Court, if necessary.

B. Notwithstanding the assurances of the Board's Chairman that such request would be considered by the Board, the Board's Report was served on December 14, 1955, and received by mail by Petitioner on the following day, and purported to "approve" the exclusive patronage contract rate system effective January 1, 1956, thus affording only a brief time interval for the convenience of the Conference to make certain amendments in the exclusive patronage contract as required by the Board's Report. The briefness of this time interval was further complicated by the fact that the Report was issued prior to the then ensuing Holiday Season.

C. Although the Board's Report contained no Order, nor did it state that any Order would ever be issued, it was necessary for Petitioner to proceed immediately into this Court in order to prevent irreparable and substantial injury from being done to it, in view of the purported "approval" of the exclusive patronage contract rate system, which was to have become effective on January 1, 1956.

D. Petitioner filed its Petition to Review and Application for Interlocutory Injunction and Temporary Stay with this Court on December 19, 1955, and on the same day served upon the Board these papers and a letter addressed to the Board calling the Board's attention to the deficiency in said Report in the failure to attach or refer to any Order. A copy of Petitioner's letter to the Board, dated December 19, 1956, is attached hereto as Exhibit B.

E. In the said letter of Petitioner to the Board, dated December 19, 1955, Petitioner also requested that upon submittal of the "conference amendment" of the exclusive patronage contract, as called for by the Board's Report, Petitioner have the opportunity to examine it and to be present at any conferences between the Board or its staff

and Conference counsel, as Petitioner and other interested parties were entitled to, under the Administrative Procedure Act and under the Board's own General Order 76.

F. Notwithstanding this formal request of Petitioner, and in contravention of the provisions of the Administrative Procedure Act and its own General Order 76, the Board by its Order, entered on the very next day and served on December 21, 1955 (a copy of which is attached hereto as Exhibit C), sought to short circuit the right of Petitioner and others to inspect and be heard on the amendment to the exclusive patronage contract with shippers, by the devise of the Board's own writing of such exclusive patronage contract which if had "approved".

G. This unilateral action of the Board in its Order, served on December 21, 1955, was a representation of the Board's zeal to protect and to espouse the Conference's interests at all costs, and was most certainly prompted by Petitioner's letter to the Board of December 19, 1955. Despite the fact that the Board's Report had stated that the amendment to the exclusive patronage contract would be made by the *Conference*, the Board's first Order, served seven days after the date of the Report and immediately after Petitioner's letter of December 19, 1955, purports to contain the Board's own effort to accomplish this amendment. So far as Petitioner is aware, neither the Conference (at that time) nor any other party to the Administrative Proceeding, required to be held pursuant to the provisions of the Administrative Procedure Act, had ever seen, much less had a fair hearing on, such modification of the proposed exclusive patronage contract prior to the service of said Order.

H. In the original Report of the Board (page 47 of the mimeographed copy thereof), the Board stated that, "we disapprove the contract form insofar as it purports to cover F.o.b. or F.a.s. sales." The first Order of the Board served on December 21, 1955 orders (sic.) the "approval" of the exclusive patronage contract rate system of the Conference, "excepting that said contract system shall not apply

to shipments which are made on an F.O.B., F.A.S., or ex godown basis or to the transportation of cargoes in refrigerated compartments."

I. The order served by the Board on January 11, 1956, which is the subject of this motion, states that the exclusive patronage system shall not apply to F.O.B. and F.A.S. shipments, etc., "unless the person whether seller or buyer, named as shipper in the ocean bill of lading is a contract signatory". In order to effectuate this new amendment to its Order, whatever such confused language may mean, the Board also makes certain further amendments in the exclusive patronage contract it has written.

J. Such new order of the Board attempts to accomplish a major and most fundamental change in the exclusive patronage contract, and there are no findings whatsoever in its original Report to support this new conclusion. The previous filings of Petitioner to this Court and the affidavits of Matthew S. Crinkley have proceeded on the assumption that the exclusive patronage contract rate system, as "approved" by the Board, would not apply to F.O.B. or F.A.S. shipments, as the Board's Report and first Order had stated. The essential importance of this matter is indicated, for example, on page 3 of Mr. Crinkley's Supplementary Affidavit, where he states that the most Petitioner could hope to carry once the exclusive patronage contract should go into effect would be "about 500 tons from importers in the United States, who buy on an F.O.B. basis, ..." Mr. Crinkley's statement was obviously based on the assumption that the exclusive patronage contract rate system would not be allowed to apply to F.O.B. or F.A.S. shipments. By its new Order, however, the Board apparently gives the Conference the go-ahead signal to use its coercive powers upon consignees located in the United States, so that any carryings Petitioner would thereafter get would not only be *de minimus*, they would be virtually non-existent.

K. Said supplementary Order of the Board recites that,

"*It appearing*, That the exceptions to the aforesaid approval granted in said order require clarification and for good cause appearing;"

Such Order nowhere states who has shown the "good cause" or what the reasons might be for this drastic amendment. Petitioner believes that such amendment was prompted by certain *ex parte* representations and arguments made by the Conference in private conferences and conversations with the Board, none of which representations or arguments are recited or mentioned in such supplementary Order, and none of which were ever the subject of a formal notice given to Petitioner and to the other parties to the administrative proceeding.

2. The Federal Maritime Board cannot, by its strange and unprecedented method of issuing post mortem orders, after the issuance of its Report, avoid the statutory requirement of making proper findings. The matter of the Conference proposal to control F.O.B. and F.A.S. shipments under the exclusive patronage contracts was a material issue in the administrative proceeding before the Board. Such matter was the subject of several proposed findings, conclusions, and exceptions to the Recommended Decision of the Examiner, which were filed by all parties. Every party to the administrative proceeding, including the Board's own counsel, except the counsel for the Conference, opposed the coverage of F.O.B. and F.A.S. shipments by the exclusive patronage contract. Presumably, the Board in its original Report and in its first Order ruled that the exclusive patronage contracts could not legally reach so far. Now, by its supplementary Order, issued eleven (11) days after even the effective date of the Board's purported "approval", the Board would change its prior holding and give the Conference the all-inclusive and completely predatory power it requested.

This invocation of the star chamber methods cannot be sanctioned or permitted by the Administrative Procedure Act. In this respect, section 8(b) of that Act provides:

"The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record."

This provision of the Administrative Procedure Act applies to all Orders "required by statute" to be determined on the record after opportunity for an agency hearing.

3. There can be no doubt that "Findings and conclusions must include all the relevant issues presented by the record." Sen. Doc. No. 248, 79th Cong., 2d Sess. pp. 210, 211 (1946). There were many issues presented at the hearing concerning the patent unfairness of controlling F.O.B. and F.A.S. shipments. The major objection to such control is that it would provide the Conference with the *immediate* power to monopolize *100* per cent. of the cargo in the trade. It was developed at the hearing that it would be fundamentally unfair for the Conference, domiciled in Japan, to attempt to control F.O.B. or F.A.S. consignees located in the United States. Many of these elements of unfairness are clearly apparent on the face of the exclusive patronage contract. For example, Article 10 of the proposed exclusive patronage contract, as approved by the Board, would subject American consignees located in New York, or in other parts of the United States to the following contractual provision:

"Any controversy, claim or dispute arising out of or relating to this agreement which cannot be settled amicably shall be settled by arbitration in Tokyo, Japan."

4. The Board's Report and its Orders are fundamentally deficient in disclosing or stating any findings or reasons which would support the amendment in its supplementary Order that F.O.B. and F.A.S. shipments may be covered by the exclusive patronage contract. Any arguments which have been presented by Conference counsel *ex parte* to the

Board have not been the subject of any disclosure to Petitioner. Petitioner is protected from such procedural unfairness. In this respect, section 7(c) of the Administrative Procedure Act, concerning "Hearings" provides, *inter alia*, that:

"Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."

Section 5(b) of that Act provides that every agency must afford *all* interested parties the opportunity for:

"(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit . . . "

Certainly neither "time" nor the "public interest" could work to deprive Petitioner of these statutory rights and elemental considerations of fairness in this case. The Conference has furthermore by its Stipulation filed with this Court on December 28, 1955, agreed not to put the exclusive patronage contract rate system into effect until after March 1, 1956.

5. The supplementary Order of the Board is fundamentally defective on its face. Administrative Orders must like the injunction order of a Court, state with reasonable specificity the acts which may be done and which cannot be done, and such Orders must be reasonably related to the findings upon which they rest. *NLRB v. Express Publishing Co.*, 312 U.S. 426 (1941); *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948). In the instant case, the Federal Maritime Board, by its supplementary Order, is attempting to shift to this Court the factual questions and issues which must necessarily be involved in the proposed amendment. An administrative agency cannot avoid its statutory responsibility to make findings of fact in this way. As stated by the Supreme Court in *FTC v. Morton Salt Co., supra*, 54,

"The effective administration of the Act, insofar as the Act entrusts administration to the Commission, would be greatly impaired if, without compelling reasons not here present, the Commission's cease and desist orders did no more than shift to the courts in subsequent contempt proceedings for their violation the very fact questions of injury to competition, etc., which the Act requires the Commission to determine as the basis for its order."

It is the basis for the Board's supplementary Order which is now completely lacking to Petitioner, and to which Petitioner should be entitled in order to proceed with its instant Petition to Review and its Application for Injunction Relief.

Wherefore, Petitioner, Isbrandtsen Company, Inc., respectfully moves that this Court remand to the Board the aforementioned Order of January 10, 1956 and that the Board be directed to recite the circumstances and reasons prompting it and to state the findings of fact which the Board considers would support it.

January 14, 1956

/s/ John J. O'Connor
John J. O'Connor
Attorney for Petitioner
Washington Building
Washington 5, D. C.

EXHIBIT B

Law Offices

JOHN J. O'CONNOR

29 Broadway
New York 6
BOwling Green 9-2348

Washington Building
Washington 5, D. C.
REpublic 7-1080
Washington, D. C.

December 19, 1955

Federal Maritime Board
441 G Street, N.W.
Washington 1, D. C.

Dear Sirs:

As you know, Isbrandtsen Company, Inc., has filed in the United States Court of Appeals for the District of Columbia Circuit this morning, a Petition to Review your Report of December 12, 1955, purporting to authorize the Japan-Atlantic and Gulf Freight Conference to institute its exclusive patronage contract dual rate system effective January 1, 1956; we have also filed an application for an Interlocutory Injunction and a request for an immediate and Temporary Stay pending the Hearing and determination of such application.

You will appreciate that it was necessary for us to move rapidly into Court in order to prevent irreparable injury of Isbrandtsen. An adjudicatory decision by an administrative agency is ordinarily accompanied by an order, unlike your Report of December 12, 1955. Because of the shortness of time involved, it was necessary for us to assume after inquiry that your omission of an order was inadvertent.

Since your Report was not served until December 14, 1955, and did not reach me by Registered Mail until the following day, there were at most a total of sixteen (16) days, assuming your date of January 1, 1956, contemplated Washington time, five (5) of which are Saturdays, Sundays and

Holidays when neither the Board nor the Courts would be open. The Conference, however, has always emphasized the fact that it is "domiciled" in Japan and, as the Board may take official notice, the time in Tokyo is more than one (1) and one-half (½) days earlier than Washington, D. C., time. If the assumption should be made that your effective date of January 1, 1956, meant Tokyo time, we would have had only nine (9) business days to prepare our papers and receive a determination on relief requested from the Court.

I assume that in fixing the effective date of January 1, 1956, you denied my informal request to the Chairman that any Report or Order you issued in the dual rate cases contain a provision that the system could not go into effect for thirty (30) or forty-five (45) days after the issuance of such report or order, so as to give us time to go into Court. I now make a formal request for such action in Docket Numbers 743, 725 & 751 in the event that Board action there should be adverse to us.

We have promptly informed the Conference of our filing in Court this morning. The Conference Counsel, Mr. Turk, has stated to me that the Conference would not put the System into effect until on or after March 1, 1956. I have agreed, upon his request, therefore, not to press for a Hearing and determination on our application for Interlocutory Injunction and Temporary Stay, provided we can agree to a Stipllaton which he requested I submit to him.

Since the time interval between service of your Report and the effective date of your authorization was so short and would have necessitated major changes in the exclusive patronage contract of the Conference, it has occurred to me that you may have contemplated that the Conference would make these changes unilaterally or after ex parte Conferences with the Board or its staff. As you know these are matters of the most vital concern to Isbrandtsen, concerning which we were the party presumably most directly responsible for the changes you suggest, and I must insist on our right to review such amendments and to be apprised of and be present at any discussions between Conference Coun-

sel or Representatives and the Board and its staff. By making this request, I, in no way intend to imply, tacitly or otherwise, that I agree with the Board's method—if such is the intention—of accomplishing the required amendment to the exclusive patronage contract. I believe that the amendment contemplated is new and requires public notice and publication in the Federal Register just as any other new filing of an agreement.

I would appreciate your prompt reply.

Respectfully,

/s/ JOHN J. O'CONNOR.

O/mj
Copies to all Attorneys on Record.

Filed January 24, 1956

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ISBRANDTSEN COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA and
FEDERAL MARITIME BOARD,
Respondents,

and

JAPAN-ATLANTIC and
GULF FREIGHT CONFERENCE ET AL,
Intervenor Respondents.

No. 13027

Answer of Respondent Federal Maritime Board to Petitioner's Motion for Remanding of Order to the Federal Maritime Board

In answer to petitioner's Motion for remanding of "Order to the Federal Maritime Board" respondent Federal Maritime Board states:

The motion is without substance and appears to have been interposed for purposes of delay. It should be denied. By the motion petitioner asks first that the matter be remanded to the Board so that the Board may recite to petitioner "the circumstances and reasons prompting" the January 10th Order of the Board which was issued in conformance with its 51 page report. We believe such a request to a Board or Court to be unprecedented. But even if petitioner were entitled to such a request, it is unnecessary to remand the Order as we here, in this answer, do recite such circumstances and reasons in detail for the benefit of the Court. The second request of the motion is to remand for proper findings of fact pursuant to the Administrative Procedure Act. We can only conclude that this request must have resulted from petitioner's failure to examine the Board's Report.

It is our purpose in this answer, after presenting a brief chronology of events with respect to the Report and Orders, to first state the charges made by petitioner and then answer them point by point.

The Board's report was issued on December 12, 1955, and served on December 14, 1955. The report specifically stated it was not to go into effect until January 1, 1956. On December 21, 1955, the Board served an order which by its own terms was not to go into effect until January 1, 1956, and on January 10, 1956, the Board issued a clarifying order which superseded and cancelled its order of December 21, 1955.

1. Petitioner's representations in numbered paragraphs 1(A-G) charge that the Board did not accede to petitioner's informal request, made one month before the Board's report issued, for a temporary stay of from thirty to forty-five days after such report, or order would issue; that the Board did not issue an order with its report of December 12, 1955; and that the Board when it issued its order of December 21 and January 10 did so in violation of the

Administrative Procedure Act, because it failed to consult with petitioner before the issuance of said orders.

a. Respondent is at a loss to understand how the fact that when the Board issued its report and stay, it only partially granted the informal request made by petitioner to the Chairman about a month before the report was issued is in any way violative of the Administrative Procedure Act. It is manifest that a request for a stay, even a formal one timely made after the order was issued, does not as a matter of right stay the action of a court or an agency. Under Rule 16(c) Rules of Practice and Procedures of the Federal Maritime Board, and Rule 10(d) Administrative Procedure Act, the grant of a stay from any administrative action is always at the discretion of the agency.

The Board's report issued on December 12, 1955, by its own terms did not become effective until January 1, 1956. Thus, as the report could have been made effective on the date of issuance, petitioner was given the unusual concession of 19 days in which to prepare for judicial review. In any event, petitioner was not harmed by the Board's reluctance to grant him his entire informal request for a 30 to 45 day stay, as the Conference has voluntarily stated it could not put the contract rate system into effect until March 1, 1956.

b. There is no requirement that makes it incumbent upon an agency or a court to attach an order or judgment simultaneously with its report or opinion, as petitioner seems to claim in Paragraph 1C. This is particularly so in this case where the Board's report of December 12 was not made effective until January 1.

c. Petitioner's representations in paragraphs 1 (E, F, and G) that he had a right to be heard in the promulgation of the Board's order of December 21, 1955, are baseless. No applicable statute or rule of the Board gives a party a right to participate in the promulgation or issuance of

a Board order, especially an order made after full evidentiary hearings. The power to issue orders is particularly within the province of the agency. Moreover, petitioner's representations in paragraph 1(D) wherein he chastizes the Board for its failure to attach an order to the report of December 14, 1955, is completely inconsistent with the representations made in paragraph 1(G), where he claims the unilateral action of the Board in issuing its order of December 21, 1955, is violative of the Administrative Procedure Act. If the Board had attached an order to the report of December 14, 1955, it would, of necessity, have to have been issued by the unilateral action of the Board. This, we believe, points up the fact that the entire motion is wholly lacking in substance.

An administrative agency has the inherent power to amend an order without a hearing, to remove ambiguity, where as in this case the subject matter of the amendment was within the original inquiry on which evidence was introduced at the hearing. *Pennsylvania R. Co.* v. *U. S.*, 288 Fed. 88, 1923 (3 judge court). If, as petitioner claims, notice and hearing is a prerequisite to the issuance of an order which itself resulted from a hearing, one wonders how an order could ever be issued.

This Board has been granted broad statutory authority by Section 25 of the Shipping Act of 1916 (46 U.S.C. 824) to "*reverse*, *suspend* or modify, upon such notice and in such manner as it deems proper, any order made by it." Surely if the Board has such complete discretion to even *reverse* or *suspend* an order it may without question simply clarify its previous order without notice or hearing, especially where, as here, no detrimental reliance or action has been taken on its previous order.

2. The remaining paragraphs of petitioner's motion represent that the Board's order of January 10, 1956, accomplished a major change in its order of December 14, 1955; that the subsequent and clarifying order was not

supported by the findings of the Board's report; that the failure to make these findings improperly shifted to this Court the factual questions and issues; that affidavits filed on Petitioner's behalf before this Court were based on the Board's original order, and that the latter order of the Board was prompted by ex parte representations and arguments made by the Conference to the Board.

a. The Board's order of January 10, 1956, simply clarifies their original order. ~~There~~ is no fundamental change or departure between the two orders. The first order of the Board does not, as petitioner erroneously asserts, unqualifiedly except from the contract-rate system all shipments made on an f.a.s., f.o.b. basis; nor does the second order unqualifiedly except from the system shipments made on this basis, nor does the report. The purpose of the second order was to clarify the first order, and to remove any uncertainty as to its affect on f.o.b., f.a.s. shipments in the light of the Board's report.

b. The first order, while based upon the report of the Board was not as explicit on the f.o.b., f.a.s. question as the second order. The amended order directly and specifically carries out what the Board had expressed on the subject on pages 46 and 47 of its report, which we quote in full.

"Various of the provisions of the contract form proposed for use in this trade require particular examination, for as hereinbefore indicated, shipper witnesses in this proceeding were unfamiliar with the contract and had not been consulted by the conference in its preparation.

"We consider articles 1 and 6 of the form contract to be unacceptable as presently drafted despite the conference explanation that article 6 constitutes a modification of article 1 and is controlling over the earlier provision. The two articles under any construction are objectionable, because as drafted the receiver under the f.o.b., f.a.s. shipments may obtain contract rates so long as he patronizes exclusively conference vessels but once he ships non-conference, he may not thereafter receive contract rates. This

provision is objectionable because such a receiver obtains the benefit of contract rates without signing a shipper contract whereas all other non-signers are charged the full non-contract tariff rates and, therefore, unlike treatment is being accorded non-signers. *Such f.o.b. receiver should receive contract rates only if he is a contract signatory.*

"We approve the contract form insofar as it purports to cover c.i.f. and c. & f. sales. *Except as stated below*, we disapprove the contract form insofar as it purports to cover f.o.b. or f.a.s. sales. Irrespective of the terms of the sales agreement, *in any instance where the contract signer appears as shipper in the bill of lading, such fact alone automatically requires that the shipment move on conference vessels.* In the situation where the contract signer appears as shipper in the bill of lading, it is no mere matter of form to say he is the shipper in fact. In c. & f. or c.i.f. sales the problem does not arise, because there the contract signer is in fact the shipper, *but in f.o.b. or f.a.s. sales we deem it undesirable to have the answer to this problem turn on the complicated questions of law as to risk of loss or when title passes* in determining *when a given shipment is or is not covered by the shipper's agreement.* We deem it highly desirable that simple tests and standards be applicable.

"*To this end we consider that the contract should indicate that the person indicated as shipper in the ocean bill of lading shall be deemed to be the shipper.* We do not intend, however, to preclude shipment by an exporter as agent for the buyer, where the exporter only renders assistance at the buyer's request and expense, in obtaining the documents required for purposes of exportation." (Emphasis added)

We respectfully invite the Court to compare this language with that of the order sought to be remanded. The above language from the report constitutes findings of fact on the qualification of f.o.b., f.a.s. shipments under the contract, and clearly demonstrates that this subject was thoroughly and exhaustively explored at the hearings. It is a complete answer to petitioner's claims that f.o.b., f.a.s. provisions of the order are not supported by findings. It goes without saying that it is also a complete refuta-

ion of petitioner's surprising categorical statement (pp. 4 and 5) that by the Board's report the exclusive patronage contract system should not apply to f.o.b., f.a.s. shipments.

The fact that the Board did not preface its statements on pages 46 and 47 with the caption "Findings of Fact" is immaterial. Formalized findings are not necessary. *New York Central & H.R.R. Co.* v. *Murphy, et al.*, 224 F. 407, 408 (1915) It is sufficient if the findings are set forth in any of the statements of the report. *Leigh Valley R. Co.* v. *American Hay Co.*, 219 Fed. 539 (1914) Nor are findings required in the Board's order. *Carolina Aluminum Co.* v. *Federal Power Commission*, 97 Fed. (2) 435, 436 (1938)

b. Petitioner also complains that it has had no opportunity to be heard on the extent to which f.o.b. or f.a.s. shipments should be included in the shipper's contract. The full record is not yet before this Court. When it is filed the Court will have the opportunity of noting the extent to which the contents of the dual rate contract and the problems relating to f.o.b., f.a.s. shipments were explored. But it is patent that the Board could not have commented so fully on the subject in the quoted portion of its report and elsewhere (for example, pp. 16, 17 and 18) without the parties having been heard fully on the subject. In a proceeding as extensive as this has been it hardly need be pointed out that this particular petitioner would not have remained silent on such a major issue. The *Express Publishing* case, and *Morton Salt* case, cited on page 8, of petitioner's motion, enunciate sound principles of law, but they are not applicable to this proceeding as the Board did make findings on which to base either order.

c. Petitioner's representation (Motion, p. 5) that Mr. Brinkley's affidavit was "based on the assumption that the exclusive patronage contract rate system would not be allowed to apply to f.o.b. or f.a.s. shipments," may be correct but if correct it can only be concluded that he had not read the report issued prior to his affidavit. It was incumbent upon affiant to appraise himself of the contents

of the Board's report before he executed his affidavit. If this were done he would have no doubt that all f.o.b., f.a.s. shipments were *not* excepted from Board approval of the contract-rate system. Even a most cursory reading of pages 46 and 47 of the report set out above indicates that f.o.b., f.a.s. shipments under certain circumstances may be included under the contract.

d. In paragraph 1(K) petitioner has expressed the belief that the clarifying order of January 10, 1956, "was prompted by certain ex parte representations and arguments made by the Conference in private conferences and conversations with the Board." This belief is false. The short and simple answer is that Conference representatives at no time conferred with the Board individually or collectively on the matter. We would consider it unnecessary and undignified to pursue the matter further but because of the persistent aspersions cast on the Board by this petitioner we set forth the facts in detail:

After the issuance of the Board's original order and at the time when the General Counsel and his legal staff were making preparations to oppose petitioner's application for a preliminary injunction, filed in this Court, the question arose as to what extent the approval of the contract-rate system pertained to f.o.b., f.a.s. shipments. The Board's report was compared with its order by the General Counsel's legal staff, and it was their tentative view that possibly the order needed clarifying. This view was discussed with the Assistant General Counsel and later with the General Counsel. The date was approximately December 22, 1955. No agreement was then reached as to the need for or method of clarifying the order, although various proposals were made and considered.

In the middle of the following week, Mr. Elkan Turk, Jr., one of the counsel for the Conference, telephoned the General Counsel to comment on whether a memorandum had been filed by the General Counsel for the Board in opposition to petitioner's motion for preliminary injunc-

tion. The General Counsel, during this conversation, related to him that there were some members of his staff that felt there was some possible uncertainty as between the order and the Board's report insofar as f.o.b., f.a.s. shipments were concerned. Mr. Turk, Jr. advised that his father was out of town.

Two or three days later, Mr. Turk, Sr. called to discuss the matter. In the meantime, the legal staff of the General Counsel had not arrived at a determination on whether the order need be clarified, and if so what, if any, clarifications to recommend to the Board. These deliberations were impeded, because a member of the legal staff most familiar with the problem was out ill. Because it was the contract of the Conference which was being restrictively modified by the Board's order, the General Counsel asked for and received suggestions from Mr. Turk.

On the return of the ill member to the staff, a form of clarifying order was adopted for presentation to the Board. Not one of the suggestions made by Mr. Turk was included in the staff's recommended clarification, nor were they transmitted to the Board.

The General Counsel then discussed this matter informally with the Chairman of the Board, who made a minor change in the recommendation, and on the same day, January 10, 1956, this matter was brought before the Board, it being stated by the General Counsel that there was some doubt whether the former order fully explained or conformed to the Board's report. On the recommendation of the General Counsel, the Board adopted the clarifying order.

At no time did a representative of the Conference speak to or communicate with the Board concerning the clarification of the order. The only contract by the conference in this matter was between the Conference and the General Counsel, and the Conference suggestions were all rejected by the General Counsel and never submitted to the Board.

e. In an overzealous attempt to represent to this Court that the original report and the original order specifically excepted from the contract system *all* f.o.b., f.a.s. shipments, the petitioner in paragraph 1(H) has flagrantly misrepresented the facts to this Court by quoting only a portion of that which the Board has stated in its report and its order.

The petitioner says:

"In the original report of the Board (p. 47 of the mimeographed copy thereof), the Board stated that, 'we disapprove the contract form insofar as it purports to cover f.o.b. or f.a.s. sales.'"

What is left out of that quotation is the Board's introductory qualifying phrase, "*Except as stated below.*" Refference to page 47 of the opinion quoted in full above, makes it clear that that which is "*stated below*" materially qualifies the flat statement in the partial quotation of petitioner, as does the entire page, particularly the sentence ending the paragraph just above the quotation. The Board there states:

"Such f.o.b. receiver *should* receive contract rates only if he is a contract signatory."

In the same subsection of the Motion, 1(H), and with the same motive, petitioner quotes from the Board's order of December 21, but again does not give the full quotation. This time petitioner ends the quote with a period when in fact the sentence is not completed. The quotation should be ended in a semicolon and the very important phrase "and to that end;" should have been added. The significance of that phrase is that it has the effect of incorporating in the order and the modification to the contracts, the very important qualification required by the Board that "the contract should indicate that the person indicated as shipper in the ocean bill of lading shall be deemed to be the shipper." (Board's report, p. 47)

We present these matters to the Court's attention for the purpose of dispelling any idea that either the order

or the report unqualifiedly excepted f.o.b., f.a.s. shipments from the contracts and for the further purpose of pointing out to the Court the caution with which petitioner's representations must be examined.

We respectfully submit that the motion to remand is completely without substance and should be denied.

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Maritime Board

James L. Pimper
Assistant General Counsel,
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Filed January 24, 1956

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ISBRANTSEN COMPANY, INC., (suing herein as ISBRANTSEN CO., INC.),

v.

UNITED STATES OF AMERICA and
FEDERAL MARITIME BOARD,
Respondents. No. 13027

and

JAPAN-ATLANTIC and
GULF FREIGHT CONFERENCE,
UNITED STATES LINES COMPANY, ET AL.,
Intervenor Respondents.

Answer of Intervenor Respondents to Motion for Remanding of Order to the Federal Maritime Board

Intervenor Respondents hereby answer the Motion of the Petitioner to remand to the Federal Maritime Board its Order dated January 10, 1956, and served on January 11,

1956, and for a direction to the Board "to recite the circumstances and reasons prompting it and to state the findings of fact which the Board considers would support it." In answer to said Motion, the Intervenor Respondents state:

1. The Motion is a frivolous one, apparently intended to secure for the Petitioner indirectly the delay in effectuation of the Board's Order which is the direct object of the Application for Interlocutory Injunction. The suggestion that the Order of the Board made on January 10, 1956 (hereinafter referred to as the Superseding Order), which, by its terms, supersedes the Order entered by the Board on December 20, 1955 (hereinafter referred to as the Original Order), is not based upon the same full Record and the same full Findings of Fact and Conclusions of Law as the Original Order is mere pretense. As will be demonstrated below, the issuance by the Board of its Superseding Order in no wise alters the scope of the review called for by the Petition herein, nor does it inject any substantially different issue into the proceeding.

2. The findings and conclusions upon which both the Original Order and the Superseding Order must rest and be reviewed appear on Page 47 of the Board's Report, only a fragment of which the Motion refers to.

"We consider articles 1 and 6 of the form contract to be unacceptable as presently drafted despite the conference explanation that article 6 constitutes a modification of article 1 and is controlling over the earlier provision. The two articles under any constructions are objectionable, because as drafted the receiver under the f.o.b., f.a.s. shipments may obtain contract rates so long as he patronizes exclusively conference vessels but once he ships non-conference, he may not thereafter receive contract rates. This provision is objectionable because such a receiver obtains the benefits of contract rates without signing a shipper contract whereas all other non-signers are charged the full non-contract tariff rates and, therefore, unlike treatment is being accorded non-signers. *Such f.o.b. receiver*

should receive contract rates only if he is a contract signatory.

"We approve the contract form insofar as it purports to cover c.i.f. and c. & f. sales. *Except as stated below, we disapprove the contract form insofar as it purports to cover f.o.b. or f.a.s. sales.* Irrespective of the terms of the sales agreement, in any instance where the contract signer appears as shipper in the bill of lading, such fact alone automatically requires that the shipment move on conference vessels. In the situation where the contract signer appears as shipper in the bill of lading, it is no mere matter of form to say he is the shipper in fact. In c. & f. or c.i.f. sales the problem does not arise, because there the contract signer is in fact the shipper, but in f.o.b. or f.a.s. sales we deem it undesirable to have the answer to this problem turn on the complicated questions of law as to risk of loss or when title passes in determining when a given shipment is or is not covered by the shipper's agreement. We deem it highly desirable that simple tests and standards be applicable.

"To this end we consider that the contract should indicate that the person indicated as shipper in the ocean bill of lading shall be deemed to be the shipper. We do not intend, however, to preclude shipment by an exporter as agent for the buyer, where the exporter only renders assistance at the buyer's request and expense, in obtaining the documents required for purposes of exportation." (Italics supplied).

The above quoted language (and particularly that in italics) disproves the contention of the Petitioner that the Board's Report did not contemplate that the contract system should extend to any F.O.B. or F.A.S. transactions. It is clear from the quoted language that the Board intended that C.I.F. and C. & F. transactions should be covered when the seller is the shipper, and that F.O.B. and F.A.S. transactions should be covered when, but only if, the buyer (receiver) is the shipper. The reason for this distinction will be adverted to below. Be that as it may, it will be obvious from a comparison between the Original Order (Exhibit C annexed to the Motion) with the Board's conclu-

sions on Page 47 on the one hand, and from a comparison of the Superseding Order (Exhibit A annexed to the Motion) with that language on the other hand, that the Superseding Order clearly accords with the Board's determination in its Report; whereas, the Original Order, which on casual reading seemingly eliminated F.O.B. and F.A.S. transactions under all circumstances from the contract system, was subject to an interpretation inconsistent with the ruling stated at Page 47 of the Board's Report.

A word of explanation appears to be in order. It might be improper for the Conference to require a Japanese exporter who signs the freight contract to ship exclusively on Conference tonnage, shipments which were made to American buyers on an F.O.B. or F.A.S. basis; for, if these transactions were true F.O.B. or F.A.S. transactions, the buyer became the owner of the goods at some point in Japan or at the very instant of loading on the carrying vessel. That kind of F.O.B. or F.A.S. transaction was intended to be excluded from the provisions of a contract signed by an exporter, and it is so excluded in the Superseding Order. However, there is another kind of situation in which it might be equally improper to exclude F.O.B. and F.A.S. sales from the benefits of the contract system. If the American buyer desires to buy on an F.O.B. or F.A.S. basis in Japan, he should be as free to receive the benefits of the contract system, including contract rates, as a Japanese seller and should not be put at a disadvantage as against competing American importers who buy on C.I.F. or C. & F. terms from Japanese exporters who are contract signatories. If the Original Order had stood as originally written, it would have been arguable that an American importer who wanted to buy his goods on F.O.B. or F.A.S. terms in Japan would have to pay the non-contract rate on all of his purchases moving on Conference vessels; whereas, his American competitor who purchased on a C.I.F. or C. & F. basis could, if the seller signed a contract, have the benefit of contract rates as the

freight component in his C.I.F. or C. & F. price. Such argument would seem to be inconsistent with the statement of the Board on Page 47 of its Report: "Such f.o.b. receiver should receive contract rates only if he is a contract signatory." However, there is no problem at all of reconciling the Superseding Order with this quoted language in the Report.

The Board's Report stated (last paragraph Page 47): "To this end we consider that the contract should indicate that the person indicated as shipper in the ocean bill of lading shall be deemed to be the shipper." Both the Original Order and the Superseding Order contain clauses appropriate to this conclusion reached by the Board. The Board's explanation for this conclusion appears in the preceding paragraphs on Page 47 of its Report. This reasoning is based upon well known principles of the law of sales. From 2 Williston, Sales (Rev. Ed. 1948) 98-101 and 170-171, it appears that many transactions which purport to be F.O.B. sales are not so at all. In such cases, the seller does not intend to pass title upon the loading of the goods aboard the vessel. He intends to hold a security title until his draft for the sales price is paid. In order to accomplish this result, the bill of lading shows the seller or his order as the shipper. Thus, the very circumstances that he is named as the shipper is proof that, notwithstanding the use of the abbreviation F.O.B. in the sales contract, the seller has retained in himself the right to possession and control of the goods past the moment of issuance of the shipping documents and until such time as he is fully paid. Thus, what purported to be an F.O.B. sale partakes of those characteristics of a C.I.F. sale which are relevant to the problem dealt with the two Orders of the Board.

It is, therefore, apparent that the Superseding Order carries out with clarity the intent and purpose of the Board's Report. The following conclusions also result therefrom:

(a) That the Motion shoots far of the mark when it suggests that the Superseding Order would enable the Conference to control American importers. Indeed, it has the effect of affording American importers the same opportunity to contract as is extended to Japanese exporters.

(b) The Superseding Order is based upon the findings and conclusions stated in the Board's Report and requires no additional findings or conclusions. It does, and in the future will, stand or fall upon the Board's Report. If the Superseding Order is not soundly based upon the Board's Report, this Court, in its decision on the merits, will deal with it as it may deserve. No remand for that purpose is required.

3. The Petitioner's argument that it had no opportunity to be heard upon the changes which were or might be required in the form of the shippers' contract, is entirely contrary to the fact. During the entire course of the hearings before the Board Examiner—hearings which continued with minor interruptions from October 5, 1953, to December 23, 1953—the form of the shippers' contract was at all times a subject to which testimony and argument could be, and on numerous occasions were, directed. Indeed, the language at Pages 6 and 7 of the Motion itself demonstrates how live a subject of investigation this contract form continued to be throughout the hearings. In its printed brief to the Examiner, the Petitioner devoted 2½ printed pages to the argument that the form of shippers' contract (Exhibit 5 to the Conference statement under General Order 76) was bad, and that particularly to be condemned was the clause which would give F.O.B. and F.A.S. buyers an opportunity to become contract shippers. Petitioner also submitted 4 Findings of Fact and 2 Conclusions in which the condemnation of this form of shippers' contract was requested. When the Examiner's Findings and Conclusions were issued, Petitioner submitted exceptions to the portions thereof, among others, dealing with the form of shippers' contract. Upon the oral argument before the Board, at which a considerable length of

time was allowed all counsel, the subject matter of the shippers' contract was one of the principal points stressed by all counsel, and Mr. Guill, one of the members of the Board, particularly inquired of all arguing counsel, their understandings with respect to the manner in which C.I.F., C. & F., F.O.B. and F.A.S. transactions would be dealt with under the proposed form. Petitioner's counsel availed himself of the opportunity to explain his points of view with respect thereto and did not complain that he did not have an adequate opportunity to voice his views on this subject. The suggestion that the Petitioner has not been fully heard on the subject of the correct form of shippers' contract to be employed cannot be seriously urged.

4. Petitioner makes further complaint upon this ground. On Page 50 of the Board's opinion Paragraph A of the Board's conclusion, contains the following language: "The approval granted is contingent upon conference amendment of the proposed agreement with shippers to conform with our opinion herein." The Petitioner apparently would argue that this ruling required the Conference to come forward with some form of amendment which would then be subject to further trial, argument, etc. We submit that the logical result of the Board's conclusion above quoted is that the Board itself should state in specific terms how the Conference must amend its form of shippers' agreement in order to comply with the condition attached to the Board's approval of the contract system. This step the Board took both in the Original Order and in the Superseding Order. It laid down in definite terms the conditions with which the Conference must comply. Nonetheless, it is the Conference and not the Board which must amend the freight agreement in accordance with the Board's mandate in order to come within the ambit of the Board's approval.

5. The Motion in Section 5, Page 6, refers to "star chamber methods" and refers, in support of the argument

there attempted, to Section 8 (b) of the Administrative Procedure Act.

Section 8 (b) of that Act contemplates that an agency shall, after hearing, render a decision stating its findings and conclusions, and this is what the Board has done in the instant case. There is no slightest suggestion in Section 8 (b), or elsewhere in the Act, that the Order entered by the agency upon its decision need repeat those findings or conclusions or any part of them. The Board's decision here (the Report) stands as fully behind the Superseding Order as it did in the case of the Original Order. The difference is that the Superseding Order unquestionably corresponds to the decision; whereas, it may be argued that the Original Order did not correspond to the Board's decision. The important point under Section 8 (b) is that the *record* in this case; in the Board's Report, will show the rulings of the Board upon all of the findings and conclusions submitted by the parties. It appears from the language of the Superseding Order that it is not based on new or different findings or conclusions; it is merely an attempt by the Board to express in different words which, to the Board, seem more apt, "the appropriate * * * relief. * * *"[1] to be granted on the basis of the findings and conclusions contained in the Report.

6. The Petitioner would argue on this Motion to Remand its objection that Article 10 of the proposed exclusive patronage contract, as approved by the Board, would require that controversies between contract signers and carriers should be submitted to arbitration in Tokyo. Public Counsel submitted to the Examiner its Proposed Finding # 171, covering the very point which the Petitioner is now seeking to raise. Incidentally, the Petitioner did not argue this point in briefs before the Examiner or the Board. Public Counsel argued that this provision was unreason-

[1] From Section 8 (b) 5 U.S.C. § 1007 (b) of the Administrative Procedure Act.

able insofar as it might apply to a consignee located in the United States.

We suggest that the Board's failure to adopt the suggestion of Public Counsel in this regard may be explained on the following ground. The trade here involved, like all foreign commerce of the United States, concerns two separate sovereign nations respectively governing territory of origin and territory of destination. Were the United States regulatory authorities to insist that, in both outbound and homeward trades, the shippers' contract must contain provisions for arbitration in the United States, it is a very real possibility that the regulatory authorities established by the nation situated at the other end of the international traffic might, for good reason or otherwise, impose a regulation to the opposite effect. The Record before the Board in this case shows that Japan has established a regulatory agency pursuant to a statute in many respects paralleling our Shipping Act, and that this regulatory agency has entered the field of supervision over contract systems. It would seem proper that, in cases of homeward trades where the originating territory is abroad (e.g., Japan) and the exporters' places of business and the offices of the carriers which originate the traffic and issue the shipping documents are located abroad, arbitration of disputes should, in deference to the balance of conveniences, take place abroad. Reciprocally, it would be expected that in outward trades (e.g., to Japan) all arbitration would be held in the United States.

In any event, we submit that this Motion to Remand does not place upon the Court the duty of deciding the merits of the provisions of the shippers' contract. When the Petition to Review is heard, the Petitioner will have its opportunity to raise all questions regarding the validity of the Board's Order upon the Record. Incidentally, neither the Superseding Order nor the Original Order effects any change in the arbitration provision.

7. In Section 5, Page 8, of the Motion, Petitioner argues that an administrative order cannot shift to the Court factual questions and issues. It does not appear in what way Petitioner would contend that the Superseding Order shifts any issues to the Court. The issues are dealt with not in the Superseding Order but in the Board's decision and, as has been stated above, the Superseding Order adds nothing to the functions of the Court in a proceeding such as this, namely, to determine whether the Order is in conformity with the conclusions and whether the conclusions are properly drawn from the facts found and the evidence adduced.

8. There can be no doubt that the Board, even in the absence of an enabling statute, had the power to make the Superseding Order clarifying the Original Order.

In *Pennsylvania R. Co.* v. *United States*, 288 Fed. 88 (W.D. Pa. 1923), a three Judge Statutory Court had before it the question of the power of the Interstate Commerce Commission to amend one of its orders. Originally, after a full hearing the Commission had entered its order directing the Pennsylvania Railroad to establish rates applicable to destinations "east of Harrisburg, Pa., as shown in Pennsylvania Railroad Tariff AA—I.C.C. No. 1132". Thereafter, the Pennsylvania Railroad established such rates but refused to include certain Atlantic Coast piers in the territory governed by such rates. An interested party complained to the Commission that this act of the Railroad was contrary to the intent and purpose of the order which had been entered. Thereafter, without notice or further hearing, the Interstate Commerce Commission amended its order so as specifically to make it apply to the Atlantic Coast piers. The act of the Commission in thus amending its order without notice to any party, was attacked by the Railroad before a Statutory Court. That Court emphasized the fact that the amended order was not based on any new evidence and that the Railroad had

fully litigated the question during the original hearing. The Court cited no statutory warrant for the Commission's action. In disposing of the matter, the Court said:

"And it has been made to appear to the court, and we find as a fact, that testimony actually was taken at the hearing relative to shipment of coal to said piers and transshipment by water. The transcript of the testimony taken makes it quite plain that the participants in the hearing had the matter in mind, and recognized the fact that the Pittsburgh Terminal Railroad & Coal Company was seeking a complete outlet for its coal to and through the destinations named in Tariff AA—I.C.C. 1132. In other words, we find there was no actual denial of hearing upon the question involved by the Interstate Commerce Commission.

"Assuming this fact, there can be no question, we think, as to the power of the Commission to amend its order, without further hearing, for the purpose of removing ambiguity. The prayer for a preliminary injunction is denied."

Upon this showing the bill for relief was dismissed.

The Pennsylvania case was referred to by the Supreme Court in *L. & N. R. R.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, 225 (1925). There, an Order of the Interstate Commerce Commission ordered reparations in favor of the shipper and against the carrier. After court proceedings in which this Order was sustained, the Interstate Commerce Commission at the instance of the shipper, but without any notice or hearing to the Railroad Company, set aside the above Order and entered a new Order which refused the amount of reparations payable by the Railroad. In thus reducing the amount the Commission acted upon admissions by the shipper that certain items of reparations had been improperly included in arriving at the total award. However, in addition to eliminating these items which were concededly improper, the Railroad contended that the Commission added certain items which the Railroad had contested, and which originally had been excluded. There can,

of course, be no doubt but that the aggregate of the second award was smaller than the aggregate of the first award. In sustaining the action by the Commission without notice, the Supreme Court emphasized that at the earlier stages of the proceeding before the Commission, the Railroad had every opportunity to litigate and actually did litigate all of the questions involved in making the second Order. Without referring to any statutory warrant, the Court disposed of the matter in the following manner, at P. 225:

"The Commission, like a court, may, upon its own motion or upon request, correct any order still under its control without notice to a party who cannot possibly suffer by the modification made. Compare *Pennsylvania R.R. Co.* v. *United States*, 288 Fed, 88. This power of the Commission is, in adversary proceedings, narrowly circumscribed; and its exercise is not to be encouraged."

Where an administrative agency having rendered its decision issues an Order which it later finds not to be in conformity with its decision, and where no new evidence of any kind is required, and where all of the parties have fully litigated all of the questions involved prior to the issuance of the agency decision, no statutory warrant is required in order to enable the agency to correct an ambiguity or to clarify its Order, or to make it conform to its decision. Such was the case here. The Board, however, does have broad statutory warrant which enables it to "reverse, suspend or modify" its own Orders. This statutory warrant appears in Section 25 of the Shipping Act, (46 U.S.C. § 824) which provides as follows: "The Commission may reverse, suspend, or modify, upon such notice and in such manner as it deems proper, any order made by it." It should be noted that the foregoing language is much broader than the provision contained in the corresponding section of the Interstate Commerce Act —§ 16(6) (49 U.S.C. § 16(6)), which is as follows: "The Commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper." It will be observed that the power to re-

verse which is granted in the Shipping Act is absent in the Interstate Commerce Act. Nonetheless, in *Froeber-Norfleet, Inc. v. Southern Ry. Co.*, 9 F. Supp. 409 (N.D. Ga. 1934), the Commission had entered an Order determining that certain rail rates were reasonable. Petitions for reconsideration were denied. Thereafter, another petition for reconsideration was filed, and on these petitions, the Commission ordered that the proceeding should be reopened. Without further hearing, the Commission then entered its Report following another decision in another case in the same general destination territory and thereupon, found that the rates were unreasonable. In other words, here was a complete reversal of the position which the Commission had taken. *Its conclusion derived from the findings and the evidence was completely altered.* Under the Commission's Rule 15(e), a petition for rehearing could not be filed more than 60 days after the service of a report. In speaking of the situation thus presented, the Court used the following language:

"The Commission may properly, under its rule 15(e), deny a party the right to file a petition for rehearing in a reparation case unless it be presented within 60 days, but I do not see anything in this rule to prevent the Commission, on its own motion, from reconsideration and reversing or modifying one of its orders, whether the matter be brought to its attention by a petition, which a party could not file as a matter of right, or in some other way."

The corresponding provision in the Civil Aeronautics Act 49 U.S.C. § 645(d), is quite similar to that obtained in the Interstate Commerce Act, and is much narrower than that contained in Section 25 of the Shipping Act above quoted.

In *Southwest Airways Co.* v. *Civil Aeronautics Board*, 196 F. 2d 937 (9th Cir. 1952), the Board had entered an Order granting a temporary certificate to an airline. Thereafter, upon a petition for reconsideration, but without any hearing, the Board entered an Order rescinding the tem-

porary certificate. The airline objected that its rights had been violated because it had no opportunity to be heard before the entry of this second Order. The Court said, at P. 938: "* * * The Board certainly has the power to reconsider its orders and set them aside, 49 U.S.C.A. § 645 (a) and (d), and if certificates not yet effective are dependent on those orders, they will also be extinguished. The situation is totally different from that in which a certificate has become effective."

We consider it obvious that the Order originally entered is ambiguous. Although the first "Ordered Clause" appears to eliminate f.o.b. and f.a.s. shipments, the second "Ordered Clause", which sets forth in *haec verba* the provision which the Board had prescribed for inclusion in the contract, contains the provision (wholly consistent with the Board's Report) that for all purposes of the agreement the person indicated as shipper in a bill of lading shall be deemed to be the shipper of the goods. Under the proviso, if a contract signatory should offer a shipment to a Conference line, such Conference line would have to give the shipper the benefit of the lower contract rates without inquiring into the nature of the transaction by which he gained right to make shipment of the goods, i.e., whether it was c.i.f. or c. & f. or f.o.b. or f.a.s. Likewise, if a signatory to the contract should make a shipment by a non-conference line and if the bill of lading governing the shipment were in his name, he could not be heard for the purpose of this agreement to argue that he had rightfully shipped by the outside Conference line, because under the terms of his transaction with somebody else, he may have been engaged in shipping goods which he had purchased f.o.b. or f.a.s. This ambiguity and inconsistency the new Order eliminates.

9. Having thus dealt with the merits of this Motion, we must now deal with Petitioner's insinuations respecting the Board and the conference. The statement appearing at Page 5 of the Motion "that such amendment was prompted

by certain ex parte representations and arguments made by the Conference in private conferences and conversations with the Board * * *" is absolutely untrue. The intimation that the Original Order might require a change in verbiage was first communicated to counsel for the Conference by the Board's General Counsel in the course of a telephone call from Conference counsel with regard to certain subject matter contained in the Board's Answer to the Petitioner's Application for Preliminary Injunction. After Conference counsel had learned of the Board Counsel's concern on this subject, however, he made certain suggestions to Board's Counsel over the telephone and during a visit to Washington, as to the manner in which the Original Order might be recast so as to eliminate the concern expressed by Board's Counsel. No discussion was had with any member of the Board and not one of the suggestions made by Conference counsel to Board's Counsel was adopted; and the amendatory language embodied in the Superseding Order is 100% the work of the Board itself and/or of its staff.

Conclusion

Petitioner's Motion suggests no proper reason for the remand of the Superseding Order. Intervenor Respondents are driven to the conclusion that the Motion is being made merely for the purpose of achieving, indirectly, the relief sought by the Application for the Interlocutory Injunction.

We respectfully submit that the Motion should be denied.

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Filed January 24, 1956

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ISBRANDTSEN COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA and
FEDERAL MARITIME BOARD,
Respondents,

and

JAPAN-ATLANTIC and
GULF FREIGHT CONFERENCE ET AL,
Intervenor Respondents

No. 13027

Reply of Petitioner to Answers of Respondent Board and Intervenor Respondents to Petitioner's Motion to Remand the Order of the Board

Petitioner herein, Isbrandtsen Company, Inc., submits the following reply to the Answers of the Intervenor Respondents and the Respondent Federal Maritime Board:

1. Petitioner considers it appropriate to reply to the respective Answers of the Intervenor Respondents and the Respondent Federal Maritime Board in one document, since, through deliberate joint efforts or otherwise, they contain similar, if not identical, arguments. Petitioner considers it unnecessary to reply in detail to the customary epithets of the Conference and the Board, which merely characterize their approach to the legal problems which arise whenever the inviolable exclusive patronage contract rate system is attacked. The characterization of Petitioner's Motion as "frivolous" by the Conference may serve the purposes of the Conference counsel of avoiding the serious substantive legal questions involved, but these customary tactics can hardly succeed in effacing these

problems. Certainly, Petitioner, in maintaining costly and seemingly endless litigation before the Board and the Courts since 1948, attacking the fundamental legality of the predatory exclusive patronage system, has hardly been indulging in frivolities. Such an abusive charge is also presumably leveled at the United States Departments of Justice and Agriculture which have joined Petitioner or taken the same position in attacking the legality of the system in this litigation before the Board and the Courts. Presumably also the charge would cover the Board's own overseer, the Department of Commerce which, at times, has taken the same position. The completely unfounded suggestion that Petitioner has interposed its Motion to Remand for purposes of delay is either self-delusion or the peculiar and misconceived theory of these counsel on the methods of legal self-defense. Petitioner does not request nor desire any delay in this Court's decision on its application for Interlocutory Injunction or in its Petition to Review but it feels entitled to have an unambiguous and unequivocal statement of the Board's findings of fact and conclusions, on which the Board's supplemental Order of January 10, 1956 may be based, so that it may proceed intelligently with its Petition to Review. This is the purpose of the instant Motion to Remand the latest supplemental Order of the Board.

2. The Answers of the Conference and the Board attempt to create the impression that there is some measure of clarity attendant to the Board's original Report and that the findings and conclusions therein in fact support its supplemental Order of January 10, 1956. Upon analysis, however, the Board's purported findings are not merely hopelessly involuted—they just do not intelligently support what the Conference and the Board now say they "clearly" mean. Petitioner, before filing its Petition to Review, read and reread several times every line of the Board's Report. There are many parts of the Report which could only be interpreted by a party in privy with the Board, and not by

any transportation or legal expert, no matter how clairvoyant he might be. The Board's failure of expression is not, however, unprecedented for it has on occasion gone even so far as to state that it may have approved some exclusive patronage system unconsciously or tacitly. Nevertheless, in order to indulge the Board and the Conference in their curious post-mortem analysis, petitioner is willing to undertake a critical exposition of each sentence in that part of the Board's Report, appearing on pages 46 and 47 of the Mimeographed copy thereof, which the Board and the Conference both quote in their answers (Such sentences are listed separately below under the headings A through M):

A. "Various of the provisions of the contract form proposed for use in this trade require particular examination, for as hereinbefore indicated, shipper witnesses in this proceeding were unfamiliar with the contract and had not been consulted by the conference in its preparation."

This statement is clear, so far as it goes, and is most certainly true. The Conference shipper witnesses were all unfamiliar with and did not understand the exclusive patronage contract (Transcript, Docket 730, pp. 697, 700, 717, 2819, 2824). It was testified, furthermore, that such shippers understood that the contract was merely tentative and that it would be discussed with shippers before becoming effective (Transcript, Docket 730, pp. 648, 700, 717, 727, 728).

B. "We consider articles 1 and 6 of the form contract to be unacceptable as presently drafted despite the conference explanation that article 6 constitutes a modification of article 1 and is controlling over the earlier provision."

Articles 1 and 6 of the proposed contract purported to cover all shipments on Conference vessels whether they were made "C.I.F., C.&F., F.O.B., ex go down or by any other terms." The quoted language of the Board, while not especially meaningful, at least gives the impression that these articles were for some reason unacceptable to the Board.

C. "The two articles under any construction are objectionable, because as drafted the receiver under the F.O.B., F.A.S. shipments may obtain contract rates so long as he patronizes exclusively conference vessels but once he ships non-conference, he may not thereafter receive contract rates."

This language is obscure and meaningless. The reason stated would hardly support the Board's newly discovered conclusion that F.O.B. and F.A.S. shipments could be covered by the exclusive patronage contract. So far as petitioner is aware the underlying theory of the exclusive patronage contract rate system is that the contract signer would obtain "contract rates so long as he patronizes exclusively conference vessels but once he ships non-conference, he may not thereafter receive contract rates." If this provision is unlawful, and it is Petitioner's contention herein and the purpose of this Review that it is, then the entire exclusive patronage contract rate system is unlawful.

D. "This provision is objectionable because such a receiver obtains the benefits of contract rates without signing a shipper contract whereas all other non-signers are charged the full non-contract tariff rates and, therefore, unlike treatment is being accorded non signers."

The language of the Board now becomes more and more unmeaningful and unintelligible. The reference to "This provision" is by no means clear. Up to this point the Board had been speaking about articles 1 and 6 of the exclusive patronage contract. The Board had not mentioned or referred to any "provision" in such contract—and to this day has not. The statement says that "such a receiver obtains the benefit etc." and then goes on to say that "all other non-signers are charged the full non-contract tariff rates etc." There is no explanation of what "all other non-signers" may mean. If it should mean all other "receivers," it does not make sense, because presumably any receiver of C.I.F. or C.&F. shipments would receive the "benefit" of the contract rates *without signing* such a contract, provided the shipper or consignor had signed an ex-

clusive patronage contract. If the statement should be a cryptic and unexplained attempt to make "F.O.B. consignee" synonymous with the term "shipper" then there is absolutely no reasoning to explain such a novel and unprecedented approach.

E. "Such F.O.B. receiver should receive contract rates only if he is a contract signatory."

Both the Conference and the Board now consider this language quite significant for it appears underscored in their Answers. Standing alone it would appear to be significant, but its apparent purport is completely negated and contradicted by the various statements immediately following. There is nothing in the way of findings furthermore to support such a conclusion, if in fact it should be deemed a conclusion of the Board, which it is clearly not under any sensible reading of the Board's Report. The essentiality of findings to support such a conclusion is apparent in light of the fact that there was never any clear statement in the record that consignees would be called upon to sign such an exclusive patronage contract. Importer witnesses, *presented by the Conference*, testified that they understood that they would not be called upon to sign exclusive patronage contracts and had not even considered the possibility (Transcript, Docket 730, pp. 2208, 2819, 2824). At least one such importer (consignee) testified that he considered the contract unreasonable, and that he would not enter into it (Transcript, Docket 730, pp. 2827, 2828). In the light of this unrebutted evidence of record, a conclusion that an f.o.b. receiver should sign such a contract would be without any evidentiary support. Such a conclusion, however, was apparently allayed by the following sentence:

F. "We approve the contract form insofar as it purports to cover c.i.f. and c.&f. sales. Except as stated below, we disapprove the contract form insofar as it purports to cover f.o.b. or f.a.s. sales."

Here the statement is unequivocally made that the "contract form" is disapproved insofar as it seeks to cover F.O.B. or F.A.S. sales. It is true that the qualifying words "except as stated below" precede this statement. These words, however, were presumably intended to settle the controversy which ensued at the hearing concerning who had the right to control the routing of a shipment. The Conference counsel contended that in some cases the shipper or consignor might have the right to route an F.O.B. shipment. Presumably the Board's language which follows was intended to solve the problem of whether the shipper or consignee had the right to route an F.O.B. or F.A.S. shipment, or so Petitioner, and we believe others, understood. In any event, there is nothing stated clearly below this statement in the Board's Report that any F.O.B. or F.A.S. sales could be covered by the system. If the Board had intended to achieve such a result it certainly would have been no special problem for them so to state in clear and precise language.

G. "Irrespective of the terms of the sales agreement, in any instance where the contract signer appears as shipper in the bill of lading, such fact alone automatically requires that the shipment move on Conference vessels."

This statement is without any meaning in the context of the Board's Report. As explained in the attached Second Supplementary Affidavit of Matthew S. Crinkley (attached hereto as Exhibit A), the consignor or supplier in Japan is invariably listed in the bill of lading as the "shipper" irrespective of whether the terms of sale are F.O.B., F.A.S., C.I.F., or C.&F. Presumably, this statement standing alone would give the Conference the right to control F.O.B. and F.A.S. shipments under the exclusive patronage contract merely by the device of signing the suppliers or shippers in Japan. The previous sentence in the paragraph, which has been quoted in paragraph F above, is contradictory, however, to such a conclusion, for it states that the exclusive patronage contract is disapproved "insofar as it

purports to cover F.O.B. or F.A.S. sales." Therefore, if the Board had intended to authorize the Conference to control F.O.B. and F.A.S. shipments merely by the device of signing the suppliers or shippers in Japan, and thereby controlling them under exclusive patronage contracts, its previous statement of disapproval would be wholly without meaning. Was this a cleverly concocted device to serve the purposes of the Conference and deliberately to mislead Petitioner and this Court, as well as the shipping public? Petitioner assumed that the Board's disapproval of the contract insofar as it purported to cover F.O.B. and F.A.S. sales had some meaning. Apparently, on the basis of the Board's newly discovered interpretation, however, as issued in its Supplemental Order of January 10, 1956, this statement was without any meaning whatsoever.

II. "In the situation where the contract signer appears as the shipper in the bill of lading, it is no mere matter of form to say he is the shipper in fact."

Just what the significance of this curious statement may be, petitioner is still unaware. Petitioner is willing to admit that the consignor in Japan, who arranges for the bill of lading and arranges for the transportation of the goods to shipside, is the shipper *in fact* irrespectively of whether the terms of the particular sale are F.O.B., F.A.S., or on any other basis.

I. "In c.&f. or c.i.f. sales the problem does not arise, because there the contract signer is in fact the shipper, but in f.o.b. or f.a.s. sales we deem it undesirable to have the answer to this problem turn on the complicated questions of law as to risk of loss or when title passes in determining when a given shipment is or is not covered by the shipper's agreement."

This statement also is without any meaning. The Board speaks about a "problem" without indicating in any way what this problem may be. The statement, in any event, certainly does not indicate that the Board would authorize the signing of F.O.B. or F.A.S. consignees located in the

United States under exclusive patronage contracts, nor could it possibly support such a conclusion. As we now understand the Board's purpose, they attempt to shift the whole burden of determining what shipments may be covered by the exclusive patronage contract to an irrelevant question of fact; viz., who is named in the bill of lading as the shipper? There was not a word of testimony or discussion of such a suggestion at the hearing. The suggestion is meaningless. An F.O.B. or F.A.S. sale merely means that the buyer pays cash for the goods when they are delivered to the ship in Japan and that he has the right to designate the routing of the shipment, as set forth in Exhibit 58 in Docket 730 introduced by Conference Counsel, being the "Revised American foreign Trade Definitions," published by the National Foreign Trade Council. The problem concerning whether such shipments could be covered by the exclusive patronage contract has nothing to do with when "title passes" or risk of loss. It is a factual question of who has the right to designate the carrier. The Board, in proposing its "simple test," would presumably on its own action override or change the long-standing commercial customs and understandings in this trade.

J. "We deem it highly desirable that simple tests and standards be applicable."

It would naturally be expected that the Board after making this statement would outline some "simple test" that would apply, although it is not clear what purpose such "tests and standards" would serve. The tests which the Board actually states are not only simple, they are meaningless. Any simplicity accomplished inures entirely to the benefit of the Conference and would presumably take away the long-standing and well-recognized right of the F.O.B. buyer to designate the carrier.

L. "To this end we consider that the contract should indicate that the person indicated as shipper in the ocean bill of lading should be deemed to be the shipper."

It is just as "simple" as that! As explained in the attached affidavit of Matthew S. Crinkley, however, the person indicated as the shipper in the bill of lading is almost always the consignor in Japan, irrespective of the terms of sale. The Board, therefore, might be considered as approving the coverage of the exclusive patronage system to include F.O.B. and F.A.S. shipments, but, as stated above, this is contrary to its previously stated conclusion disapproving such a result, which at least has some measure of clarity.

M. "We do not intend, however, to preclude shipment by an exporter as agent for the buyer, where the exporter only renders assistance at the buyer's request and expense, in obtaining the documents required for purposes of exportation."

This statement, as many of the others in the Board's Report, has no particular meaning to Petitioner, nor do we believe to anybody else. What the Board may mean by their phrase "precluding" shipments is unknown. How is the Board located in Washington going to decide such complicated questions of fact under its "simple" test—or is the Conference to have the final word in sitting as judge in its own case? We can answer this—Yes!

3. The quotation, as analyzed above, cited by the Conference and the Board, taken from pp. 46 and 47 of the Board's Mimeographed Report, omits the following paragraphs which follow the quotation:

"The significance of articles 1 and 6 is readily apparent when it is realized that over 70 percent of the liner cargo in this trade moves under f.o.b. (or f.a.s.) terms.

"In this regard it will readily be recognized that participation by Isbrandtsen in this trade greater than that anticipated by the parties must be forecast, in view of the freedom of the Japanese exporter to sell and ship under f.o.b. terms."

If it was this "freedom" which the Board held out to Isbrandtsen as a gratuitous and mollifying sop to pre-

vent Isbrandtsen's total elimination from the trade, such "freedom" has now been extinguished by the Board's own interpretation of its original Declaration of Independence.

Certainly these quotations would seem to indicate that the Board was not intending to authorize the coverage of the exclusive patronage system insofar as F.O.B. or F.A.S. sales were concerned. Any fair and sensible reading of the Board's Report would support such an interpretation. The conclusion was corroborated furthermore by the first order of the Board, served on December 21, where it was stated unqualifiedly that the contract system

"shall not apply to shipments which are made on an F.O.B., F.A.S., or ex go down basis, or to the transportation of cargoes in refrigerated compartments."

Therefore, the Board's own understanding of its Report in its first Order was presumably that F.O.B. and F.A.S. shipments could not be covered by the exclusive patronage contract.

4. The Board has been willing at all times, until the instant Motion has been filed, to allow Petitioner to operate under his justified conclusion that F.O.B. and F.A.S. shipments were not to be covered by the exclusive patronage system.

Petitioner's assumption in this respect was made quite clear to the Board by Petitioner's letter to the Board dated December 21, 1955 (a copy of which is attached hereto as Exhibit B), in which petitioner stated its understanding of the Board's holding in Docket 730, "that a conference using the exclusive patronage contract non-contract dual rate system could not bind shippers under the exclusive patronage contracts with respect to F.O.B. or F.A.S. shipments." The Board now states that it was considering the "clarifying" amendment to its original Order as early as "approximately December 22, 1955." This was one day after Petitioner's letter of December 21, 1955 was delivered to the

Board, and was furthermore only one day after the issuance of the Board's first Order on December 21, 1955.

The Board was perfectly content to allow Mr. Crinkley to prepare his affidavits concerning the damage which would result to Petitioner, if the exclusive patronage contract system should be instituted, on the assumption that F.O.B. and F.A.S. shipments would not be covered by the system. There was no attempt by the Board to answer these affidavits in this respect or to correct this "misapprehension." A simple local phone call or letter to Petitioner would certainly have clarified the matter. The Board, as the Answers of the Board and Conference now admit, had no hesitancy whatsoever in talking with the Conference counsel in New York for the purpose of soliciting his views on the matter. The Board's insolent and fantastic answer is now that Petitioner's misapprehensions "must have resulted from Petitioner's failure to examine the Board's report." The Board knows Petitioner and its Counsel better than that! Constraint appears more appropriate than a reply to this abusive statement. Petitioner does say, however, that if the Board had displayed the courtesy in elemental fairness of reading and replying to its letter of December 21, 1955, Petitioner's "misapprehensions" would not have continued.

5. The practical consequences of the Board's newly announced principle that an F.O.B. consignee may be deemed the "shipper" and may be forced to sign an exclusive patronage contract with the conference are explained in the attached affidavit of Matthew S. Crinkley.

6. It is significant that the Board and the Conference both admit in their present Answers that conferences and discussions took place between the Board's attorneys and the Conference counsel concerning the subject matter of the Board's amendatory Order of January 10, 1956, prior to its issuance. The Answers of the Conference and the Board would now attempt to shroud such conferences with

the sanctimony of incidental and unimportant conversations. The fact remains, however, that one party to the administrative proceeding had privy with the Board's staff concering the amendment which affected the substantive outcome of the proceeding. How could the Board possibly destroy Petitioner's rights under the Administrative Procedure Act by the tactic of leaving part of the decision for issuance after the Board's original Report? Does the Board now suggest this as a new and novel way to deprive parties of their rights under the Administrative Procedure Act?

It makes little difference whether the conferences between the Board's attorneys and the Conference counsel were with Board members or not. The Board's Reports and Orders are assumedly in some respects institutional decisions. The Board's Answer, in fact, admits on pages 8 and 9 that the staff of the Board's General Counsel drafted the Board's Supplemental Order of January 10, 1956 and the General Counsel then presented it to the Board after the Chairman had reviewed it and made a "minor change." It is certainly a strange and frightening suggestion that the Board could immunize itself from the requirements of the Administrative Procedure Act by issuing a perfunctory report and then caballing with its own counsel, who participate in such adjudicatory proceeding, and with counsel for one of the private parties, in drafting a dispositive order to the exclusion of all other parties to the administrative proceeding. Neither Board counsel nor Conference counsel could possibly offer a single authority to support such a brazenly outrageous proposition.

7. Petitioner requested in its present Motion to Remand the Board's Supplemental Order of January 10, 1956 that the Board recite or explain the statement in the Supplemental Order that it was issued for "good cause appearing." A proper explanation in this respect has not been given in either the Answer of the Conference or the An-

swer of the Board, nor could such an explanation be satisfactorily given by counsel. Again, Petitioner does not understand the concern of the Conference in this matter which should properly be a matter to be answered by the Board.

8. The present circumstances offer the most persuasive reasons why the injunctive relief requested by Petitioner should be granted before February 1, 1956, the date on which, pursuant to the Stipulation filed by the Conference, the Conference intends to sign up shippers in the trade under exclusive patronage contracts.

WHEREFORE, Petitioner respectfully requests that the Court remand to the Federal Maritime Board and Board's Supplemental Order of January 10, 1956 for the purpose of explaining the circumstances surrounding the issuance of that Order and explaining the phrase "for good cause appearing," and furthermore, for a statement of any findings and conclusions which would support the newly discovered interpretation of the Board's report as announced in the Board's "clarifying" amendment to its original order.

January 27, 1956

JOHN J. O'CONNOR
John J. O'Connor
Attorney for Petitioner
Washington Building
Washington, D. C.

EXHIBIT A

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ISBRANDTSEN COMPANY, INC.,
Petitioner,

against

UNITED STATES OF AMERICA and
FEDERAL MARITIME BOARD,
Respondents,

No. 13027

and

JAPAN-ATLANTIC and
GULF FREIGHT CONFERENCE, ET AL,
Intervenor-Respondents.

SECOND SUPPLEMENTARY AFFIDAVIT OF MATTHEW S. CRINKLEY

STATE OF NEW YORK, }
COUNTY OF NEW YORK } ss.:

MATTHEW S. CRINKLEY, being duly sworn, deposes and says:

I am Executive Vice-President of the petitioner and have previously filed an affidavit and a supplementary affidavit in this proceeding. I now make this second supplementary affidavit for the purpose of commenting upon the supplemental order of the Federal Maritime Board, dated January 10, 1956, and the answers of the Board and the Conference to Isbrandtsen's motion to remand such order. That order now apparently authorizes the Conference to control F.O.B. and F.A.S. shipments and the consignees thereof as "shippers" under the Conference's exclusive patronage contracts, and to prevent F.O.B. and F.A.S. consignees from exercising their long-established right to designate the routing of the shipments to which they have title, over the carrier of their choice.

As I have previously stated, I attended virtually all the hearings before the Federal Maritime Board Examiner in this administrative proceeding, known as Docket 730. The various importer witnesses located in the United States, who appeared for the Conference, stated that they had never considered signing such an exclusive patronage contract.

Previously to filing my original and supplemental affidavits, I had read the Board's Report several times and had discussed it with our attorney and with others. It was the unanimous opinion of all those with whom I talked that the Report expressly prohibited the exclusive patronage contract system from covering F.O.B. and F.A.S. shipments. This understanding was corroborated by the express terms of the Board's first order, served on December 21, 1955, which stated that the system

"shall not apply to shipments which are made on an F.O.B., F.A.S. or ex-go-down basis or to the transportation of cargoes in refrigerated compartments."

My previous affidavits on the subject of irreparable injury and damage which would result to Isbrandtsen upon the institution of the exclusive patronage system were premised upon the understanding I have stated above and on the assumption that if F.O.B. shipments were not covered by the exclusive patronage contract, Isbrandtsen might be able to get some of those shipments. The damage which I previously stated would result to Isbrandtsen on the institution of the exclusive patronage system would now be greatly increased, by reason of the Board's new order, served on January 11, 1956, for, without access to F.O.B. or F.A.S. shipments, we would, for all practical purposes, be completely eliminated from the trade.

Since I now understand that the latest order of the Board authorizes the exclusive patronage system to cover F.O.B. and F.A.S. shipments, by the device of considering the F.O.B. and F.A.S. supplier as a "shipper," I shall comment upon the practical results of this newly-devised

interpretation of the Board's order by the Board itself. I am intimately familiar with bills of lading used in this trade, with experience in such matters for about thirty years, and with the understanding of the terms therein in the trade and the methods used in effecting sales between suppliers in a foreign country and receivers in the United States. Now, at this late date, I am advised that the following language in the Board's order is particularly relevant in this respect, to wit:

"provided that, for all purposes of this agreement, the person indicated as shipper in any ocean bill of lading shall be deemed to be the shipper of the goods described in the bill of lading."

This would now become the language of the exclusive patronage contract, as re-written by the Board itself.

In ocean bills of lading the consignor is virtually always indicated as the shipper, whether the sale is F.O.B., F.A.S., C.I.F., or any other basis. The ocean bill of lading itself does not indicate the terms of the sale. For example, if supplier A, in Japan, sells F.O.B. Tokyo to buyer consignee B, in New York, A is shown as the shipper in the bill of lading. The Board's new order, stating that the shipper appearing in the bill of lading should be the controlling matter as to who should be bound under the exclusive patronage contract, would mean that the supplier in Japan would be bound, even on F.O.B. and F.A.S. shipments, if he has signed an exclusive patronage contract with the Conference to make all his shipments on Conference vessels.

From a practical standpoint, this is the way an F.O.B. or F.A.S. shipment would be handled, where the buyer consignee gives instructions for the routing of the shipment. He gives instructions as to the line or vessel to be used to carry the goods and opens a letter of credit through his United States Bank, providing for payment to be made for the goods against surrender to the Bank in Japan of the original ocean bills of lading, properly endorsed. They

are the controlling documents concerning the cargo itself. The buyer must use this method, because he can hardly afford to pay for the goods before he is able to exercise control over them. Thus, the supplier is forced to take out the bill of lading in his own name. He cannot take it out showing the buyer as shipper, for to do that would mean that the supplier would lose control before he is able to receive payment through the Japanese Bank against the buyer's letter of credit. Invariably, the procedure is that the supplier takes out the ocean bills of lading, showing himself as shipper, and that the goods are consigned to his own order. He then endorses the bill of lading and it becomes a negotiable document, which he can turn over to his Japanese Bank, whereupon he receives payment for the goods, and simultaneously the Japanese Bank forwards the endorsed bill of lading to the buyer in the United States. The buyer then has control of the goods for which he has paid.

It is my firm conclusion, from my experience, that the supplemental Order of the Board gives to the Conference the go-ahead signal to control all shipments in the trade—F.O.B. and F.A.S., as well as C.I.F., etc., and therefore enables the Conference to destroy any independent competition immediately and completely, on the basis of any access to F.O.B. shipments.

I believe the shipping public was entitled to rely on a sensible business reading of the Board's Report, which Report, by itself, expressly stated that F.O.B. and F.A.S. shipments could not be controlled by the exclusive patronage contract. It was not until the second Order of the Board that such a reasonable conclusion and interpretation was attempted to be repudiated.

We have a result here, where the confused wording of the Board's Report, in connection with the Board's supplemental Order, makes no sense, in the way that the result would work out.

From my experience as a practical shipping man in this trade and many others, I state frankly that I do not understand the Board's reasons as stated and I cannot find in the Board's Report or Orders any relevant findings that are stated to support the Board's newly-expressed conclusion as to the coverage of F.O.B. shipments.

This entire matter is too vital to the proper conduct of the commerce of the United States to be left in such a state of confusion, especially if the final interpretation is that F.O.B. and F.A.S. sales and shipments are to be covered by exclusive patronage contracts, which the supplier of the goods enters into with the Conference. Such an arrangement would upset the basic, long-established fundamental custom, practices and understandings, as generally agreed to by national and international trade organizations and banks, and so expressed in their published definitions of international trade terms.

Sworn to before me this
25th day of January, 1956

MATTHEW S. CRINKLEY

LUCY S. BUTLER

Notary Public, State of New York
#41-0521350 Qualified in Queens County
Term Expires March 30, 1957

EXHIBIT B

LAW OFFICES
JOHN J. O'CONNOR
WASHINGTON BUILDING
WASHINGTON 5, D. C.

December 21, 1955

Re: Docket No. 764

Mitsui Steamship Co. v. Pacific Coast European Conference Lines

and

Docket 773

American Potash & Chemical Corporation v. Pacific Coast European Conference Lines

Federal Maritime Board
441 G Street, N. W.
Washington 1, D. C.

Dear Sirs:

We are now compelled to ask you to act promptly, and without further delay, on our Petition, dated and verified November 1, 1955, to intervene in the above-mentioned Dockets, which we filed, pursuant to Rule 5(n) of your Rules of Practice and Procedure, nearly two (2) months ago.

Isbrandtsen is the only independent American Flag operator on this Trade Route, and it competes directly with the twenty-one (21) Foreign Flag and one (1) American Flag Members of the Conference. The temporary independent Foreign-Flag operator, Mitsui, belongs to Conferences all over the world.

Our present and most urgent request is prompted by the article in the "Congressional Information Bureau,"

Bulletin Number J-17 of December 19, 1955, that the Pacific Coast European Conference at a "special meeting," held on Friday, December 16, 1955, has "agreed to admit Mitsui Steamship Co. to membership, upon the unconscionable condition, however, that Mitsui withdraw from pending regulatory cases in which its position is opposed to that of the Conference."

What potion does this Conference—to end all conferences—imbibe and becomes so inebriated that it dare attach such onerous and illegal conditions to conference membership in direct violation of the Board's decisions?

Could this Board possibly permit such brazen interference with lawsuits pending before it?

It is significant that this "special meeting" of the Conference was held two (2) days following the public release of the Board's Report in the Japan-Atlantic and Gulf Freight Conference case, Docket 730, which Report held, *inter alia*, that a conference using the exclusive patronage contract/non-contract dual rate system could not bind shippers under the exclusive patronage contracts with respect to F.O.B. or F.A.S. shipments.

That decision of the Board clearly invalidates the Recommended Decision of the Examiner in said Dockets 764 and 773, to which we have filed exceptions, and from which Proceedings the Conference now attempts to slither out from under an inevitable adverse Decision which must necessarily follow from the Board's holding in Docket 730. This deliberate stratagem to avoid a Board decision, and the application to this Conference of the unequivocal and long waited statement of the law therein, is now conceived to force, Mitsui to withdraw its complaint and intervention in pending adjudicatory proceedings, being held pursuant to the Administrative Procedure Act, under the threat of withholding membership in this historically arrogant Cartel. This public display of self-asserted sovereignty and immunity from the provisions of the Shipping Act is taken in the face of the constant reiterations by steamship con-

ference spokesmen and by the Federal Maritime Board that any qualified member—including even Isbrandtsen—would be entitled to membership, and that the Board stands every ready to exert its full power in that direction, holding the penalty of cancelling the Conference Agreement. Thus this conference is deliberately and brazenly attempting to avoid a Board decision involving its use of a practice, which the Board itself has now condemned in Docket 730, and could not fail to condemn here—this defiant attempt to avoid an Order against it, moreover, is taken by the brazen assertion of a power which the Board has said no conference can have.

The very expected dangers which compelled Isbrandtsen to file its Petition to intervene, which were stated specifically therein, may now occur. The American Potash & Chemical Corporation has already "withdrawn" its Complaint in Docket 773, and now the Conference hopes to succeed further by eliminating the Proceedings entirely by forcing Mitsui also to withdraw its complaint in Docket 764 and to withdraw as to intervenor in Docket 773.

We have, of course, no interest in insisting that Mitsui pursue its claim for damages against the Conference, to which claim it seems clearly entitled. We submit, however, that the Conference cannot now be allowed to continue its practice of controlling F.O.B. and F.A.S. shipments under its exclusive patronage contracts, in view of the Board's decision in Docket 730, condemning this practice. In view of the interest already shown by the Department of Justice in these illegal practices by this very conference, the current shenanigans of the predominantly foreign group will undoubtedly excite their further interest.

The clear decision of the Board in Docket 730 should, we submit, leave no doubt that the Board must take immediate steps to halt this illegal practice engaged in by the Pacific Coast European Conference. If Mitsui should decide to withdraw its complaint in submission to the con-

ference pressure, the Board would, of course, review the proposed settlement of the adjudicatory proceedings involved. As an applicant Intervenor in these proceedings, and as an American operator in the trade, Isbrandtsen demands that the terms of any such settlement be publicly disclosed.

In any event, Isbrandtsen's Petition for Intervention in the above-mentioned Proceedings, should be promptly acted upon, and the Board should consider and act upon the Exceptions to the Recommended Decision of the Examiner.

Please advise the undersigned promptly with respect to these inquiries so that I may be in a position to take whatever further steps it may be necessary or advisable to pursue.

Respectfully yours,

ISBRANDTSEN COMPANY, INC.
By JOHN J. O'CONNOR

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ISBRANDTSEN COMPANY, INC.,
Petitioner,

v. No. 13027

UNITED STATES OF AMERICA and
FEDERAL MARITIME BOARD,
Respondents.

Affidavit of Lloyd Tibbott

DISTRICT OF COLUMBIA, ss:

LLOYD TIBBOTT, being duly sworn, deposes and says:

I am Chief of the Regulation Office of the Federal Maritime Board. Among other things I have the duty and responsibility to maintain records of conference agreements, tariffs, and rate practices. In addition, I am the chief offi-

cer of the Federal Maritime Board charged with the administration of its regulatory functions.

The following is a list of the more important trades in the foreign commerce of the United States which are covered by steamship conferences using a dual rate contract system but in which common carriers by water operate services outside of the conference. This information has been compiled from the following sources:

1. As to Conferences using contract rates and as to the date when the system was placed into effect, my source is:

   Filings made with the Federal Maritime Board pursuant to the Board's General Order 76. (This order became effective November 11, 1952, and required every conference employing a dual rate system as of that date to file with the Board a statement as to the date when contract/non-contract rates were first established by the conference, together with particulars as to the system and the reasons for its use.)

2. As to non-conference operations in trade covered by conference contract rates, my source is:

   Export rate filings made by common carriers by water in the foreign trade of the United States as required by the Board's continuing order in Docket No. 128 (1 U.S.S.B.B. 470). (This order became effective September 1, 1935, and continued in effect since that date. This order requires every common carrier by water in foreign commerce to file a schedule of its rates and charges for the transportation of property from points in continental United States to foreign ports within a period of 30 days after a rate becomes effective.)

   As to the rate filings made by carriers operating outside an existing steamship conference (non-conference carriers), a further check has been made against sailing cards and other published sailing schedules to

assure that the non-conference line is still in active operation.

Trade: NORTH ATLANTIC—UNITED KINGDOM

Contract Rates in effect since 1923.

Non-Conference Carriers:

Mitsui Steamship Co., Ltd. 10-8-54 to date.

Trade: GULF & SOUTH ATLANTIC—CONTINENTAL EUROPE

Contract Rates in effect since 1930.

Non-Conference Carriers:

Independent Gulf Line. 8-15-55 to date.

Trade: NORTH ATLANTIC—MEDITERRANEAN

Contract Rates in effect since 1925.

Non-Conference Carriers:

Isbrandtsen Co., Inc. 6-1-48 to date.
Costa Line. 12-10-48 to date.
Yugoslav Line. 5-22-47 to date.
Denizcilik Bankasi TAO. 4-12-54 to date.
D. B. Denz Nakliyati TAO. 5-31-55 to date.

Trade: GULF—MEDITERRANEAN

Contract Rates in effect since 1930.

Non-Conference Carriers:

Sidarma Line. 3-28-55 to date.
Fabre Line. 9-17-55 to date.

Trade: ATLANTIC—INDIA, PAKISTAN, CEYLON & BURMA

Contract Rates in effect since 1947.

Non-Conference Carriers:

Isbrandtsen Co., Inc. 1-20-47 to date.

Trade: ATLANTIC—MALAY STATES

Contract Rates in effect since 1931.

Non-Conference Carriers:

Isbrandtsen Co., Inc. 4-17-48 to date.

Trade: ATLANTIC—FAR EAST

Contract Rates in effect since 1929.

Non-Conference Carriers:

Isbrandtsen Co., Inc. 11-1-46 to date.

Trade: PACIFIC COAST—EUROPE (United Kingdom & Continent)

Contract Rates in effect since 1937.

Non-Conference Carriers:

Mitsui Steamship Co., Ltd. 7-1-54 to date.
Hanseatische Reederei Emil Offen & Co. 10-14-55 to date.

Trade: PACIFIC COAST—EUROPE (Mediterranean)

Contract Rates in effect since 1937.

Non-Conference Carriers:

Isbrandtsen Co., Inc. 3-3-50 to date.

Trade: ATLANTIC & GULF/WEST COAST OF SOUTH AMERICA

Contract Rates in effect since 1934.

Non-Conference Carriers:

Compania Maritima y de Comercio del Peru (Peruship). 5-24-55 to date.

.....

Lloyd Tibbott.

Subscribed and sworn to before me this ..... day of December, 1955.

.....

Notary Public,
District of Columbia.

My Commission expires .....

Copy of

FEDERAL MARITIME BOARD

Agreement No. 3103

Approved June 25, 1934

As amended to August 27, 1952

Japan-Atlantic and Gulf Freight Conference Agreement

Conference Membership as of September 16, 1952

American President Lines, Ltd.
(Barber-Wilhelmsen Line)—Joint Service of
Wilhelmsens Dampskibsaktieselskab
A/S Den Norske Afrika—og Australielinie
A/S Tonsberg
A/S Tankfart I
A/S Tankfart IV
A/S Tankfart V
A/S Tankfart VI
Skibsaktieselskapet Varild
Skibsaktieselskapet Marina
Aktieselskabet Glittre
Dampskibsinteressentskabet Garonne
Skibsaktieselskapet Sangstad
Skibsaktieselskapet Solstad
Skibsaktieselskapet Siljestad
Dampskibsaktieselskabet International
Skibsaktieselskapet Manderville
Skibsaktieselskapet Goodwill
Daido Kaiun Kaisha
(De La Rama Lines)—Joint Service of
The De La Rama Steamship Co., Inc.
The Swedish East Asia Co., Ltd.
The Ocean Steam Ship Co., Ltd.
The China Mutual Steam Navigation Company, Ltd.
Nederlandsche Stoomvaart Maatschappij "Oceaan" N.V.

(Ivaran Lines—Far East Service)—Joint Service of
Skibsaktieselskapet Igadi
Aktieselskapet Ivarans Rederi
A/S Besco
A/S Lise
Kawasaki Kisen Kaisha
(Kokusai Line)—Joint Service of
Kokusai Kaiun Kaisha, Ltd.
Iino Kaiun Kaisha, Ltd.
Mitsubishi Kaiun Kaisha, Ltd.
Nissan Kaisen Kaisha, Ltd.
Toho Kaiun Kaisha, Ltd.
Lancashire Shipping Company, Ltd.
Lykes Bros. Steamship Co., Inc.
Mitsui Steamship Co., Ltd. (Mitsui Line)
(A. P. Moller-Maersk Line)—Joint Service of
Dampskibsselskabet af 1912 Aktieselskab
Aktieselskabet Dampskibsselskabet Svendborg
Nippon Yusen Kaisha
Osaka Shosen Kaisha, Ltd.
Prince Line, Ltd.
Shinnihon Steamship Co., Ltd.
(States Marine Lines)—Joint Service of
States Marine Corporation
States Marine Corporation of Delaware
United States Lines Company (American Pioneer Line)
Waterman Steamship Corporation
Yamashita Kisen Kaisha

May 23, 1934

WITNESSETH: That in consideration of the benefits, advantages and privileges to be severally and collectively derived from this agreement, the parties hereto, common carriers by water, hereby associate themselves in a conference to be known as the JAPAN-ATLANTIC and GULF FREIGHT CONFERENCE to promote commerce from JAPAN, KOREA and OKINAWA to UNITED STATES

GULF PORTS and ATLANTIC COAST PORTS of NORTH AMERICA.

1. *Purpose of Agreement:* This agreement covers the establishment, regulation and maintenance of agreed rates and charges, for or in connection with the transportation of all cargo in vessels owned, controlled, chartered and/or operated by the parties hereto in the trade covered by this agreement including cargo transhipped at ports within the scope of this agreement.

2. *Freight Charges:* All freight and other charges for or in connection with such transportation shall be charged and collected by the parties hereto strictly in accordance with rates, charges, classification, rules and/or regulations adopted by the parties and recorded in the tariff or tariffs of the conference. All rates, charges rules and/or regulations, and additions thereto and changes therein, adopted pursuant to the provisions of this agreement, as well as a copy of minutes of all meetings and of all circulars and other conference papers recording action of the parties under this agreement, shall be furnished promptly to the Governmental agency charged with the administration of Section 15 of the United States Shipping Act, 1916, as amended.

3. (a) *Open Rates*: The parties hereto may declare rates on specified commodities to be "Open" and may thereafter declare the rates on such commodities, or any of them, to be "Closed." In the event that the rates on any commodities shall be declared "Open" the conference shall so indicate in its tariff and shall designate the extent to which it shall have relinquished control over the booking and transportation thereof.

(b) *Scale of Rates:* The parties hereto mutually agree that the scale of rates shall be those agreed upon from time to time, and published in the JAPAN-ATLANTIC and GULF FREIGHT CONFERENCE tariffs, reissues thereof and supplements thereto and no party shall engage directly

or indirectly in the aforementioned transportation under terms and conditions other than those herein mentioned.

4. *Non-Conference Representation*: No party hereto shall be represented at any port or ports covered by this agreement, by any agent engaged in the solicitation, booking, receipt and/or documentation of cargoes without requiring such agent to agree that such agent will not represent, except as husbanding agent, any common, private or contract carrier in the trades within the scope of this agreement other than a carrier who is a party to this agreement; and each party hereto agrees to be fully responsible to the other parties hereto for any loss or damage sustained by such other parties by reason of any act or omission of an agent which shall constitute a violation by such agent of this agreement, or would constitute a violation hereof if such agent were himself a party to this agreement; and no party shall act as an agent in the solicitation, booking, receipt and/or documentation of cargoes for any common, contract or private carrier, other than another party to this agreement, in trades within the scope of the agreement; provided, however, that nothing in this agreement shall operate to restrict the right of any party to act as the agent of its Government subject to the understanding that the conference shall be fully informed in advance; with respect to the nature and effect of any such arrangements and same shall be fully recorded in conference minutes; and provided further, that the furnishing of information in violation of the security regulations of its Government shall not be required of any party.

5. *Unfair Practices Prohibited:* There shall be no undue preference or advantages nor unjust or unreasonable discrimination nor unfair practices against any consignor or consignee by any of the parties hereto.

6. *Rebating Prohibited:* (a): The payment of commissions or brokerage of any nature to any party or parties whatsoever, in a direct or indirect manner, is prohibited.

Nothing herein contained shall prohibit the payment of customary fees to duly appointed vessel agents and the payment of not more than 5% (five per cent) commission to sub-agents.

(b): The parties hereto agree that they will have only one office of their own or one agent or sub-agent at any one port in Japan, Okinawa and Korea and inland agents in these territories are prohibited. Agents or sub-agents at any port must have licensed and established ship-handling departments.

7. *Special Privileges Prohibited*: The giving or receiving of special rates or other special privileges or advantages not offered to all shippers shipping under similar conditions is prohibited. Special privilege shall include, but not be limited to, the granting of free or reduced passages, allowance or special accommodation to any place or port for any shipper, consignee or broker, or prospective shipper, consignee or broker, or for any officer, employe, agent, or representative of any shipper, consignee or broker, or prospective shipper, consignee or broker, or to any member of the family of any of the aforesaid.

8. *Absorptions:* The absorption of wharfage, storage, or other charges against cargo is prohibited except as may be agreed between the parties hereto, and shown in the conference tariff.

9. *Sworn Measurers:* Sworn measurers recognized by the conference shall be employed at all ports within its jurisdiction where it may be found practicable for the weighing and/or measuring of all cargo received for shipment on vessels of the parties to this agreement, the cost of such service to be borne by the parties of the conference who carry the cargo thus weighed and/or measured.

10. *Breach of Agreement:* (a): In the event of any violation of this agreement by any of the parties hereto and/or their respective agents, such party or parties shall be sub-

ject to the payment of damages for each and every violation which shall be decided and assessed to the satisfaction of all parties hereto, except the party or parties charged with the violation, but if the party and/or parties hereto committing the alleged violation of this agreement are dissatisfied with the decision come to, such party and/or parties shall have the right to appeal, in which event the question of breach of agreement and damages shall be left to the determination of three arbitrators to be nominated within 30 days from the day on which the appeal of the party and/or parties charged with the violation will be received at the conference office.

One of the arbitrators will be nominated by two-thirds of the parties hereto, except the party or parties charged with the violation, one by the party or parties charged, the third shall be appointed in agreement of the two arbitrators so nominated. The arbitrators shall make their award friendly and the decision of two or more of the arbitrators shall be final and binding on the parties hereto. There shall be no appeal against the award of the arbitrators. All payments of any amounts awarded shall be made to the conference and placed in the general funds of the conference.

(b): In addition to the payment of damages, the offending party at the option of the conference shall be liable to expulsion from the conference or suspension of voting rights for such period of time as the conference may determine. Determination in the first instance as above as to a violation of this agreement and/or of any rules, regulations or tariff provisions of the conference, and whether the penalty shall be expulsion, suspension of voting rights and/or the payment of liquidated damages, and if the latter, the amount thereof, shall be made in accordance with Article 19.

(c): In no case shall the party complained against have any vote in the determination of the foregoing matters. The party complained against shall have the right to be heard and to offer a defense against the accusation even though

such party may not be afforded the right to vote on his guilt or innocence.

(d): No expulsion shall become effective until and unless notice thereof, with a detailed statement of the reason or reasons therefor, shall have been air-mailed or cabled to the Governmental agency charged with the administration of Section 15 of the United States Shipping Act, 1916, as amended. Notice of suspension of voting rights pursuant to this article shall be furnished promptly by airmail or cable to the aforementioned Governmental agency.

11. *Withdrawal:* Any party may withdraw from the conference by giving ninety days written notice of intention to withdraw to the conference; provided, however, that no withdrawal shall affect the liability of a withdrawing party to the conference arising out of any breach of the conference agreement or otherwise, or conference obligation incurred up to the date withdrawal becomes effective and provided further that no party who has served a notice of withdrawal shall be entitled to vote on any conference matter, the decision with respect to which is to become effective after the effective date of such party's withdrawal or is to continue in force beyond such date. Notice of withdrawal of any party shall be furnished promptly by air-mail or cable to the Governmental agency charged with the administration of Section 15 of the United States Shipping Act, 1916, as amended.

12. *Faithful Performance:* (a): As a guarantee of faithful performance hereunder, and of prompt payment of any liquidated damages which may accrue against them or of any award or judgment which may be rendered against them hereunder, the parties hereto agree to deposit with the conference Secretary the sum of Twenty-five Thousand Dollars ($25,000.00) in United States Government bonds, or in United States currency, or surety bond of like amount satisfactory to the conference, which shall be deposited or invested as may be agreed by the parties pursuant to Arti-

cle 19. Any interest accruing thereon shall be for the account of the party making such deposit and shall be remitted promptly to such party if received by the conference. Each of the parties further agrees to deposit additional cash or security upon demand so as at all times to maintain cash or securities or any combination of both of a total market value equivalent in United States currency to the amount hereinabove specified. Such deposits or the proceeds thereof shall be applied to the payment of any liquidated damages imposed in accordance with Article 10 or elsewhere in this agreement, unless otherwise fully paid or previously satisfied.

(b): In the event of the termination of this agreement or the termination of membership or withdrawal of any of the parties hereto, the deposits made by the parties concerned shall be returned to them, together with any accrued interest in the possession of the conference, but only after any indebtedness to the conference has been fully satisfied.

13. *Membership:* Any common carrier regularly operating or giving substantial and reliable evidence of intention to operate regularly in the trades covered by this agreement may become a member of this conference upon the approval by the parties hereto as provided in Article 19 and by affixing its signature to this agreement or a counterpart thereof. No admission to membership shall be effective until air-mail or cable advice thereof has been sent to the Governmental agency charged with the administration of Section 15 of the United States Shipping Act, 1916, as amended. Every application for admission to membership shall be acted upon promptly. No carrier shall be denied admission except for just and reasonable cause, and advice of any denial of admission to membership, together with a statement of the reason or reason therefor, shall be furnished promptly to the Governmental agency charged with the administration of Section 15 of the United States Shipping Act, 1916, as amended.

14. *Rules and Regulations:* (a): Members of the conference hereby organized shall abide, and the conference shall be governed, by the rules and regulations from time to time made by the said conference, which shall include, among other things, provisions in respect to meetings, both regular and special, payment of expenses incurred in the maintenance of the conference, and such other matters as, in the opinion of the members of the conference, are necessary or desirable to further the ends of the conference as set forth herein.

(b): No such rule or regulation or alteration thereof, which constitutes a modification, addition or supplement to this agreement, shall be made effective until it has been approved pursuant to Section 15 of the United States Shipping Act, 1916, as amended.

15. *Admission Fee:* A fee of One Thousand Dollars ($1,000.00) shall be assessed each applicant upon admission or readmission to the conference, no part of which shall be returned except upon dissolution of the conference, in which event all sums of money then remaining in the hands of the conference, after payment of all expenses, shall be divided among the parties as they may determine.

16. *Meetings:* Meetings of this conference shall be held in Tokyo, Japan, or elsewhere, as may be agreed upon by the parties. Regular meetings shall be held once a month. Other meetings may be called at any time by the Chairman and he shall call a meeting whenever requested to do so by any party.

17. *Notice of Meetings:* Except as may be otherwise unanimously agreed by all members entitled to vote, notice of meetings shall be furnished at least twenty-four hours in advance by the Chairman to all parties. Notice shall specify the subjects to come before the meeting and no subject shall come before a meeting unless advance notice thereof has been given as herein required except by the unanimous consent of all parties entitled to vote.

18. *Quorum:* Three-fourths of all parties entitled to vote shall constitute a quorum at all meetings, except when considering changes in this agreement when a quorum shall consist of four-fifths of all parties entitled to vote.

19. *Decisions:* (a): A quorum being present, decisions under this agreement, other than changes in the agreement itself, are to be determined by a two-thirds vote of all parties present and entitled to vote. In cases of changes in this agreement, all parties agree to be bound by changes made with the consent of two-thirds of all parties entitled to vote.

(b): The Chairman shall have authority, with respect to decisions on rate matters, to obtain the votes of the parties by telephone in lieu of meeting in conference. All members entitled to vote must be contacted and their votes obtained in each case. Decisions on matters voted on by telephone shall be made by a two-thirds vote of all parties entitled to vote.

(c): At the request of any member, voting shall be by secret ballot which shall be counted by the Secretary who shall announce the result of the ballot.

20. *Voting Privileges:* Except as otherwise specifically provided in Articles 10 and 26, each party shall have one vote on all matters and shall be represented by an accredited representative at all meetings.

21. *Officers and Duties:* (a): The parties hereto may designate a Chairman and/or other officers and prescribe the duties and the compensation payable thereto. The duties of said officers may be exercised by one and the same person. A minute record shall be kept of the proceedings of all meetings.

(b): *Chairman:* The Chairman shall prescribe at all regular and special meetings of the Conference. Should the Chairman be unable to attend such meetings, the Vice-Chairman shall preside, if a Vice-Chairman has been desig-

nated by the conference. In the absence of both the Chairman and Vice-Chairman, the Deputy Chairman shall preside, if a Deputy Chairman has been designated by the conference. In the absence of all three, a Chairman pro tempore shall be elected for the meeting by the members in accordance with Article 19.

(c): *Vice-Chairman:* If a Vice-Chairman is designated by the conference, he shall perform any duties of the Chairman during his absence.

(d): *Deputy Chairman:* If a Deputy Chairman is designated by the conference, he shall perform any duties of the Chairman in the absence of both the Chairman and Vice-Chairman.

(e): *Secretary:* The conference shall appoint a Secretary who shall carry out the duties assigned to him in this agreement and those assigned to him from time to time by the conference. The Secretary shall be paid such remuneration as may be agreed to by the members.

22. *Executive Committee:* (a): There shall be a standing committee known as the Executive Committee, consisting of five (5) members. The conference Chairman shall be the Chairman of the committee during his term of office. If a conference Vice-Chairman and Deputy Chairman are designated by the conference, as authorized by Article 21, they shall be members of the Executive Committee during their term of office. Other members shall be elected by the parties in accordance with Article 19 to serve for a period of six months.

(b): The duties of the Executive Committee shall be as follows:

(1) To be responsible for the operation of conference office.

(2) To act on urgent matters brought before them with the exception of matters concerning freight rates and

malpractices, and make recommendations to the membership.

(3) On all matters brought before the Committee, they shall decide by a vote of four-fifths of their members as to any recommendations made or action taken by them, including a decision as to whether the matter is of sufficient urgency to warrant immediate action by the committee itself or whether it can safely be, or should be, held for a decision by the entire membership.

23. *Rate Committee:* (a): There shall be a standing committee known as the Rate Committee, consisting of three (3) members. The Chairman shall appoint the members of the Rate Committee who shall hold office during the tenure of office of such Chairman.

(b): It shall be the duty of the Rate Committee to consider all requests for the establishment of new rates and tariff rules or changes in rates and tariff rules and to submit their recommendations thereon in writing through the conference Secretary for consideration at regular or special meetings of the conference.

24. *Committee on Malpractices:* There shall be a Committee on Malpractices, consisting of three (3) members who shall be appointed by the Chairman. If there is a Deputy Chairman designated by the members, as authorized by Article 21, he shall be a member of the Committee on Malpractices and shall serve as Chairman. The Secretary shall be empowered and directed by the Committee on Malpractices to investigate any reported infractions of the conference tariff, rates, rules, regulations, etc. The member lines shall cooperate with the Secretary in the conduct of such investigations and shall make available to him facilities necessary to conduct such investigations. The Secretary shall report the results of all investigations to the Committee on Malpractices for the information of the Committee and such

recommendation for action by the conference as the Committee may deem appropriate.

25. *Special Committees:* In addition to the standing Committees provided for in Articles 22, 23 and 24, there may be such Special Committees as the conference may from time to time establish. The members of all Special Committees shall be appointed by the Chairman and shall hold office during the term of his office.

26. *Maintenance of Service:* (a): Failure of any party to this agreement, to have a sailing in the trades covered by this agreement for a period of ninety consecutive days shall be a suspension of service and any party whose services have been thus suspended shall have no right to vote on any matter within the scope of this agreement, except changes in this agreement, until service has been resumed.

(b): If any party, whose services have been thus suspended, fails to resume service within a period of ninety consecutive days after the termination of the first ninety day period, the conference may, pursuant to Article 19, declare that such party has abandoned service in the trades covered by this agreement. The party whose services are involved shall have no vote in any decision hereunder. In the event of a declaration of abandonment, as herein provided, the party whose service is declared abandoned shall immediately be notified by the conference and thereupon the membership of such party in this conference shall be automatically terminated.

(c): Acts of war, strikes, lockouts, other labor disturbances, or force majeure which may result in a suspension of service or cause for a declaration of abandonment shall be considered by the parties as cause for waiving the penalty provided in this Article. In no event shall a party whose services have been suspended for a period of 180 consecutive days have the right to vote on any matters under this agreement, including changes in the agreement itself, unless such suspension of service is excused by the conference for reasons enumerated herein.

(d): Notice of loss or restoration of voting rights, abandonment of service and waiver of penalties shall be furnished promptly by air-mail or cable to the Government agency charged with the administration of Section 15 of the United States Shipping Act, 1916, as amended.

(e): Resumption of service shall be deemed to have been made as of the date a vessel commences to load at its first port of call in Japan, Korea or Okinawa for a voyage to any port of discharge covered by this agreement.

27. *Expenses of the Conference:* The expenses of the conference shall be prorated among the members as they shall from time to time determine.

28. *Delinquent Members:* A member shall become delinquent upon failure to pay any indebtedness to the conference within thirty days after receipt of notice of such indebtedness.

29. *Consular Invoices and Freight Manifests:* Before issuing Bills-of-Lading, members shall obtain from shippers properly authenticated copies of consular invoices or declarations covering each shipment in accordance with instructions issued from time to time by the Secretary, including any exceptions on commodities for which consular visas are required. Such invoices, together with true copies of freight mainfests prepared by the members and duly certified by such members, shall be filed with the office of the Secretary within fourteen days after the sailing of the vessel involved from its last port of loading in Japan; any information so filed with the office of the Secretary shall not be used in violation of Section 20 of the United States Shipping Act, 1916, as amended.

30. *Divulgence of Conference Proceedings Prohibited:*

(a): It shall be the rigid duty of each member to maintain secret and confidential the nature of all questions and matters which may come before the conference, either for consideration or decision thereon. Divulgence of such information to persons other than members of the conference

shall subject any offending member to a fine, the amount of which shall be determined by the conference but which may not, for any single offense, exceed One Thousand Dollars ($1,000.00). The offending member shall not cast any vote in the determination of the application of a fine or the amount thereof pursuant to this Article.

(b): The provisions of this Article shall include, but not be limited to, the making public of any confidential conference documents.

(c): If the conference shall be unable to determine responsibility for a violation of this Article by means of a poll of the members, the matter may, upon request of any conference member, be placed in the hands of an outside confidential agency selected by the conference to trace and determined at conference expense, the identity of the offending party or parties.

(d): All publicity concerning conference affairs, proceedings and discussions shall be disseminated only by the Secretary and under instructions from the Chairman.

31. *Responsibility for Acts of Agents and Sub-Agents:* Members shall be responsible for the acts of their agents and sub-agents in maintaining both the spirit and the letter of the conference agreement and tariff, and conference rules and regulations issued thereunder.

32. *Conference Liability:* If a member shall incur legal expenses as a result of compliance with this agreement, or any rule or regulations issued thereunder, such expenses and any damages incurred by such member arising out of legal proceedings shall be for the account of the conference and shall be pro-rated equally among the parties to this agreement; provided, however, that the conference shall determine that such expenses or damages are incurred by the member without fault upon its own part and provided, further, that such member shall report the institution of legal proceedings against it, or the threat thereof, to the conference prior to taking any action thereon individually.

33. *Party to Other Agreements:* Any carrier becoming a member of this conference shall thereby become a party to, and any carrier withdrawing from conference membership shall thereby cease to be a party to, any agreements between the member lines of the conference (jointly entered into by said member lines in their capacity as conference members), and any other carrier or other person subject to the United States Shipping Act, 1916, as amended, provided said agreements are filed and approved pursuant to the provisions of said Act and contain specific provisions for such admission to or withdrawal from participation therein.

34. *Section 15 Approval:* This agreement is subject to approval by the Governmental agency charged with the administration of Section 15 of the United States Shipping Act, 1916, as amended.

35. *Modification or Cancellation:* No modification or cancellation of this agreement, or any part hereof, shall be valid or binding upon the parties hereto unless and until it has been filed with and approved by the Governmental agency charged with the administration of Section 15 of the United States Shipping Act, 1916, as amended, and shall not be carried out in whole or in part prior to such approval.

IN WITNESS WHEREOF the parties have hereunder set their hands this tenth day of May, 1934.

For the Mitsui Bussan Kaisha
23rd May, 1934

Per pro MITSUI BUSSAN KAISHA, LTD.
(Sgd.) T. Furukawa
Manager, Freight Department

For the Barber-Wilhelmsen Line

Per pro DODWELL & Co., LTD.
(Sgd.) F. J. Horman Fisher
Shipping Department
Agents.

To The

FEDERAL MARITIME BOARD

Statement

of

Japan-Atlantic and Gulf Freight Conference

Filed Pursuant to Title 46, Chapter II, Subchapter B, Part 236, Section 236.3 of the Code of Federal Regulations, Being Paragraph 3 of Federal Maritime Board General Order 76.

The Japan-Atlantic and Gulf Freight Conference (hereinafter referred to as the Conference), acting pursuant to Federal Maritime Board Agreement No. 3103, as amended, in the trade from Japan, Korea and Okinawa to United States Gulf ports and Atlantic Coast ports of North America (hereinafter referred to as the Conference Trade), proposes to establish contract/non-contract rates in the Conference Trade and files this Statement with the Federal Maritime Board, in compliance with the directions set forth in the regulatory provision mentioned and referred to in the above caption.

This statement is based upon information obtained from official records in Japan, from the home office of the Conference in Tokyo, from the records of members of the Conference, and from information obtained in various Japanese cities by a representative of the Conference sent from the United States to Japan for the express purpose of ascertaining the facts.

A

THE AMOUNT OF THE SPREAD OR DIFFERENTIAL

The amount of the proposed spread or differential between contract and non-contract rates is 9½% of the contract rate applicable to the respective commodities and/or classes of commodities, for the transportation of which both contract and non-contract rates are made available in the proposed Conference tariff, rounded off to the nearest quarter of a dollar.

B

THE EFFECTIVE DATE

The effective date of the contract/non-contract rates shall be the thirtieth day, computed according to United States Eastern Standard Time, following the date of the filing of this statement with the Federal Maritime Board.

C

THE REASONS FOR THE USE OF CONTRACT/NON-CONTRACT RATES IN THE CONFERENCE TRADE AND THE BASIS FOR THE SPREAD OR DIFFERENTIAL BETWEEN SUCH RATES

1. THE REASONS FOR THE USE OF CONTRACT/NON-CONTRACT RATES IN THE CONFERENCE TRADE

(a) GENERAL

The reasons for the use of the contract/non-contract system in the Conference Trade flow from a number of factors, including the following: (i) the historical facts relative to the Conference and its predecessors; (ii) the stability of rates over long periods, which the Conference has been able to assure merchants engaged in exporting or importing in the Conference Trade; (iii) the increasing frequency and progressive improvement of the services rendered to the shippers by Conference members, due to competition among the members, notwithstanding uniformity of tariff rates, rules, and conditions; (iv) the rate of practices of non-

Conference competitors of a type which has been repeatedly condemned by predecessors of this Board; (v) the disruption of Conference carryings caused thereby and the consequent imminent danger that rate stability, which is vital to merchants and carriers alike, will be destroyed unless the curative effects of the contract/non-contract system of rates may be introduced.

(b) The Historical Facts Relative to the Conference and Its Predecessors

As will appear more fully from Exhibit A, hereto attached, the following agreements have successively provided for the maintenance of a conference in the Conference Trade:

Agreement Number	Date of Approval
73	February 16, 1926
129	September 4, 1929
154	May 13, 1931
3103	June 25, 1934

(c) The Stability of Rates Over Long Periods—Former Contract/Non-Contract Systems in the Trade

(i) *Long Term Stability*

Throughout the period of the conferences operating under the successive agreements referred to in Item (b) above, the conferences afforded to the exporters of Japan and the importers of the Atlantic and Gulf Coasts of the United States a very high degree of stability of rates over long periods of time. Attached hereto, marked Exhibit B, and made a part hereof, is a tabulation of the rates applicable to nine specific commodities and to the cargoes included in the classification of general cargo (n. o. s.). The specific commodities selected are among those which move in the greatest volume in the Conference Trade. The rates applying to these commodities and this classification are those which appear in all of the successive tariffs of the Conference and its predecessors which a thoroughgoing search,

at this date and after the disturbances due to World War II, has disclosed.

There are absent from this tabulation the rates which were established in tariffs numbered 7 and 9. Tariff No. 6, which is the first available Conference tariff, is not dated. However, it bears internal evidence that it was adopted at some date between Febraury 1, 1928, and December 31, 1928.

There are also missing all tariffs before tariff No. 6. However, we have been able to procure from the records of Nippon Yusen Kaisha which, with the exception of the war years, was a member of each of the successive conferences in this trade from 1926 to date; evidence to establish the level of rates from February 16, 1926, to the date when tariff No. 6 became effective with respect to the classification of cargo (n. o. s.) and with respect to two of the important commodities included in Exhibit B, *i. e.*, cheap porcelain and celluloid toys.

From the tariffs which are available and from the data obtained from Nippon Yusen Kaisha, the pattern of stability is well established. This record completely disproves the theory, advanced by some, that the Conference assures merchants stability only during the period of advance notice which Conference freight contracts establish as that which must be given to the shippers before rates can be increased. This Exhibit establishes that, although such periods of advance notice may be stated in days or months, the stability created by Conference action must, with the exception of periods of exceptional political or economic turbulence, be stated in years.

The Board will, we are sure, take official notice of the circumstance that during the twenty-six year period between 1926 and 1952 there have been varying and frequent fluctuations in the world charter markets for tonnage. These market fluctuations delicately reflect the rise and fall in the relative supply and demand for tonnage. During these periods, despite these fluctuations and the rise and fall in

demand, the Conference rates have stood firm and, over long periods, have provided the merchants dealing in the Conference Trade with a stable and non-speculative transportation factor in their export costs.

In order to assist the Board in an analysis of Exhibit B, we shall trace the rate movement of the first item appearing on that Exhibit, *i. e.*, cheap porcelain. This item is also one of the commodities which moves in greatest volume in the Conference Trade.

Reference to Exhibit B demonstrates that from February 16, 1926, to September 1, 1934, the rate on this item was $10.50 per measurement ton.[1] On September 1, 1934, the contract system was made effective and cheap porcelain was accorded a contract rate of $8 and a non-contract rate of $11 per measurement ton. Those rates remained effective until May 1, 1935. From May 1, 1935, to May 1, 1937, cheap porcelain enjoyed a contract rate of $9 and a non-contract rate of $12 per measurement ton.[2] From May 1, 1937, to October 1, 1939, (see footnote 28 of Exhibit B) the rates on cheap porcelain continued to be $10 contract and $12 non-contract per measurement ton. As of September 14, 1939, contracts for the carriage of porcelain were cancelled and the non-contract rate of $12 was charged for ships leaving Japan on and after October 1, 1939. This Conference action was taken because of the outbreak of the war in Europe which, of course, required some of the Conference members due to the diversion or requisition of their tonnage by their respective governments, to terminate or curtail their services. The performance of the rates after the outbreak of the European war and right up to the termination of commercial intercourse between the United

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[1] As stated above, tariff No. 7 is not available. However, as indicated in footnote 11 of Exhibit B, the rate of $10.50 per measurement ton continued in effect during the period above stated.

[2] As is shown in footnote 23 of Exhibit B, from July 1, 1936, to May 1, 1937, a contract rate of $10.00 per measurement ton and a non contract rate of $13.00 per measurement ton to Gulf Coast ports was established. With the coming into effect of tariff No. 12, on May 1, 1937, the same rate became applicable to both U. S. Atlantic and Gulf Coast ports.

States and Japan is, perhaps, as eloquent a demonstration of the stability which the conference system, and particularly the contract/non-contract system of rates, affords to the public as any that can be found in shipping annals. Exhibit B indicates that on December 1, 1939, the contract rate on cheap porcelain was fixed at $12 per measurement ton, and this rate continued for eight months to July 1, 1940. On July 1, 1940, the contract rate was advanced a mere 50¢ per measurement ton, to $12.50. The non-contract rate remained static at $14.50 per measurement ton, and these rates continued until the commerce between the affected countries came to an end.

The first post-war rate for cheap porcelain was established on May 1, 1948, at $39.25 per measurement ton. This rate continued effective, however, only for a period of about three weeks (see footnote 39 of Exhibit B), when the rate was reduced to $30 per measurement ton. The rate continued at $30 per measurement ton from May 26, 1948, until August 30, 1950, (see footnote 45 of Exhibit B) when it was reduced to $25. The $25 rate continued in effect until February 15, 1951, when it was increased to $28.75 per measurement ton. On April 25, 1951, although the rate remained the same, the rate basis was changed from a measurement ton to a short ton or a measurement ton, whichever would yield the greater revenue (see footnote 48 of Exhibit B). That basis and that rate continued from April 25, 1951, to November 15, 1952, when, in anticipation of the adoption of a contract/non-contract system in accordance with General Order 76, a rate for cheap porcelain was adopted which was substantially lower than the rate which was in existence immediately prior to November 15, 1952, and, indeed, the proposed non-contract rate on this item is substantially below the pre-existing tariff rate.

The record of stability of rates for the transportation of cheap porcelainware is the rule and not the exception. With some variations, a similar record will be found in the study of rates of the other items enumerated in Exhibit B.

Stability of rates is of maximum importance to merchants engaged in the Conference Trade. Without such stability they are unable to make forward commitments and to lay business plans with any certainty that their enterprises will not go awry due to the speculative character of the transportation factor in their costs. This proposition applies to the exporters from Japan, Korea and Okinawa and with equal force to the American importers who compete with domestic producers and with sources of supply in other foreign lands, as well as with each other.

(ii) *Previous Conference Contract/Non-Contract Systems*

Not the least cause for the exceptional stability which has characterized the rates in the Conference Trade has been the traditional employment by the Conference of the contract/non-contract system.

The earliest Conference tariff to which access may now be had, *i. e.*, tariff No. 6, and which was in effect prior to December 31, 1928, provided contract and non-contract rates for three items: canned crabs, lily bulbs and tea. These rates were as follows:

Item	Contract	Non-Contract
canned crabs	$10.50	$14.50
lily bulbs	15.00	20.00
tea	9.50	12.00

Tariff No. 8, which went into effect on November 1, 1930, indicates the following contract/non-contract rates:

Item	Contract	Non-Contract
canned crabs (and other canned fish)	$10.00	$14.50
electric bulbs	9.00	14.00
lily bulbs	11.00	20.00
tea	9.50	12.00
toys	9.00	14.00

All of the above rates were on a basis of 40 cubic feet.

It will be observed that both dollarwise and percentagewise the spreads between contract and non-contract rates in tariffs numbered 6 and 8 were not uniform.

Although no copy of tariff No. 9 appears to be extant, we have located a circular addressed to Japanese shippers which refers to the issuance of tariff No. 9 on November 15, 1931. The circular enumerates 22 different items to which contract and non-contract rates were made applicable and states that "Non-contract rates will be approximately 30% higher than contract rates". The circular also included a form of Conference freight contract. We attach hereto, mark Exhibit C, and make a part hereof, a copy of the aforesaid circular.

As will appear from Exhibit B, hereto attached, tariff No. 10, which went into effect on September 1, 1934, appears to be the first Conference tariff in which contract and non-contract rates were assigned to the entire range of important commodities. With the exception of the brief period of a few months following the outbreak of the European War, this practice continued from May 1, 1935, until the termination of commercial intercourse between Japan and the United States in 1941.

As also may be gathered from Exhibit B, in none of the successive tariffs does there appear to be any pattern, either from the standpoint of dollars and cents, or from the standpoint of percentages, according to which the spread or differential between the contract and non-contract rates were promulgated, excepting only with respect to tariff No. 15, which became effective on December 1, 1939. In that tariff there appears to have been a differential of 20% of the contract rate, rounded off to the nearest half dollar.

It seems probable that the contract/non-contract rates have been in effect in the Conference Trade as long as they have in any trade in the import or export commerce of the United States.

In none of the tariffs does there appear to have been a spread, however determined, as low as the spread of 9½% of the contract rates, which it is now proposed to introduce. Under the contract/non-contract system, with the spreads as above described, the export trade from Japan to the United States flourished to the advantage of both countries.

(d) The Increasing Frequency and Progressive Improvement of Service by Conference Members

A mere reference to the number of lines which are operating and which have operated in the Conference Trade, in itself, is sufficient to demonstrate that the conference system, including, over a considerable period, the contract/non-contract rate system, has had the effect of stimulating, improving and increasing the service rendered to the merchants engaged in the Conference Trade. As appears from Exhibit A, there were only three signatories to Agreement No. 73, the first Conference agreement in this trade, which was finally approved on February 16, 1926. Likewise there were only three parties to Agreement No. 129, the second Conference agreement in this trade, which was approved on September 4, 1929. There were, however, four signatories to Agreement No. 154, the third Conference agreement in this trade, which was approved on May 13, 1931, and, during the succeeding two years, two additional lines were admitted to Conference membership. The fourth agreement in this trade, No. 3103, which was approved on June 25, 1934, and which, with amendments, is presently in force, was signed by eight lines.

Due to the numerous admissions and withdrawals to and from membership of this Conference in the intervening years, all of which appear on Exhibit A, there are today in the Conference no less than eighteen members. Within the recollection of those, acting on behalf of the Conference, by whom this Statement is being prepared, at no time in the history of the successive Conferences has any appli-

cant who was ready, able and willing to render a regular and dependable service in the Conference Trade been denied membership. Conference membership would be available to the Isbrandtsen Company, Inc., (hereinafter referred to as Isbrandtsen) which is the only non-Conference line which now appears to be rendering a regular service.

Accurate records of the number of sailings of the Conference vessels in the early days are not available at the time of the preparation of this Statement. However, the frequency and regularity of service furnished by the Conference lines during the post-war period from January, 1949, is evidenced by Exhibit D, hereto attached, and made a part hereof.

But the increase in the frequency and regularity of sailings does not tell the entire story of the improved service offered by the Conference lines to the merchants engaged in this trade.

Prior to 1929 the vessels operating in the Conference Trade were not so constructed as to adapt them to the special requirements of the trade. Generally speaking, their speed was 9 to 10½ knots. Their bale capacity was in the region of 400,000 cubic feet. They had no reefer capacity and no silk rooms. In the 1930's, the Conference members entered into and completed programs for the construction of vessels which were especially adapted to this trade. They had speeds in the range of 14 or more knots. They had deadweight capacity, in many cases, considerably in excess of 9,000 tons. Their bale capacity, in all cases, was much greater than was true of the earlier vessels and, in certain cases, exceeded 600,000 cubic feet. Most of the vessels of many of the lines had reefer capacity, for the transportation of food products from Japan, and strong rooms, especially adapted for the carriage of raw silk, silk goods and and other valuable cargoes.

The competitive improvement of vessels and services among the member lines continued up to the outbreak of

World War II. At that time certain of the lines had vessels in the service capable of a speed of 18 knots and speeds of 15 to 17 knots were not uncommon. Since the conclusion of the war, the improvement of vessel types, especially adapted to the Conference Trade, continued, and only recently the vessel of one of the Conference members performed a voyage from Japan to New York in 26 days elapsed time and 24 days, 4 hours steaming time. This vessel is capable of a speed of 21 knots and steams fully loaded at 17½ knots.

It is unnecessary to stress here the tremendous investment which has been made in the construction of these fleets of modern cargo vessels.

Therefore, although the effect of Conference action has been to eliminate competition among the Conference members with respect to freight rates, rules and conditions, it has turned the competition into a race to give to the Japanese exporter and the American importer ever-improving vessels and service. It is unnecessary here to dwell on the advantages to the merchants engaged in the Conference Trade which flow from this accelerated and progressively improving service. Naturally, the Conference members would not have made the heavy investments necessary to provide these improvements unless they had expected that conditions would prevail which would permit them to remain in business.

(e) The Practices of Non-Conference Competitors

The only non-Conference liner competitor since the conclusion of the war has been Isbrandtsen.[3] This company instituted its service in the Conference Trade in or about June, 1947. Since that time it has openly followed the general policy of quoting rates which are 10% below the corresponding Conference rates, rounded off to the nearest 5 cents. Complete and illustrative evidence of this practice

[3] Please refer to Exhibit G, footnote 1.

on Isbrandtsen's part appears from a tariff issued by Hothership, Isbrandtsen's General Agent in Tokyo, which tariff bears the caption "Abbreviated Freight Tariff". A copy of this abbreviated freight tariff, issued as of June 25, 1952, is hereto attached, marked Exhibit E, and made a part hereof.

The competitive character of Isbrandtsen's rate cutting apears without qualification from Exhibit E. There will be found in parallel columns, quotations of Conference rates to the Pacific Coast and Isbrandtsen rates to the Pacific Coast (including both local rates and overland rates), and Conference rates to the Atlantic Coast as well as Isbrandtsen's rates to the Atlantic Coast.

A check of the item numbers on Exhibit E indicates that in substantially all cases the Isbrandtsen tariff carries the same "Item No." and description for each commodity as the Conference tariff.

The impropriety of this appeal to the shipping public on the basis of tariffs computed by the application of a fraction to the tariffs of a competitor has been established in unmistakable language by the decisions of the predecessors of the Federal Maritime Board.

> Docket No. 128, *Section 19 Investigation, 1935*, 1 U. S. S. B. B. 470, 498, 501 (1935);
>
> Docket No. 512, *Cargo to Adriatic, Black Sea, and Levant Ports*, 2 USMC 342, 345 (1940).

Evidence of the continuance of this practice is not wanting. Prior to the promulgation of General Order No. 76, the Conference had announced the adoption of contract and non-contract rates, effective on November 15. Isbrandtsen did not procrastinate in announcing to the public its own rate policy, predicated upon the new rates which the Conference had announced. Isbrandtsen circularized the trade with an announcement dated November 14, 1952, a copy of

which is hereto attached, marked Exhibit F, and made a part hereof, the essence of which was as follows:

"WE ARE HAPPY TO ANNOUNCE TO ALL OUR SHIPPERS THAT OUR NEW RATE EFFECTIVE S. S. 'FLYING CLOUD' WILL BE 10% LESS THAN THE CONFERENCE CONTRACT RATE"

According to the same circular, the "Flying Cloud" was scheduled to sail from Yokohama at midnight on November 17, 1952.

There can therefore not be the slightest doubt as to the impropriety of Isbrandtsen's rate practices in the Conference Trade.

Isbrandtsen, however, had not alone the advantage of quoting rates fractionally under the Conference rates. It also benefited by the stability created by the rate practices of the Conference. So long as the Conference has been willing to stand for long periods by its promulgated tariffs, Isbrandtsen could quote cut rates for like periods and thus assure to those shippers who have used its service the same ability to depend on forward rate stability as they would enjoy if they had shipped their goods by Conference tonnage. This stability and this advantage, as well as the advantage of rate cutting, would disappear once the Conference should disband or should declare its rates open. As Isbrandtsen's above practices have more and more greatly impinged upon the business of the Conference lines and as the press for drastic Conference action to meet Isbrandtsen's practices has become more and more imperative and insistent, the need for the contract system to prevent an all-out rate war has become evident to all.

Isbrandtsen instituted its service in or about June, 1947, on a schedule of one sailing a month. By virtue of its rate cutting practices, under the umbrella of the Conference policy of stable rates, this non-Conference competitor has drawn to itself an inordinate portion of the cargoes being transported in the Conference Trade.

Although prior to the year 1952 Isbrandtsen, from time to time, had two and three sailings a month, it appears definitely to have established a schedule of two sailings a month in or about August, 1951; and to have increased this schedule to three sailings a month in August, 1952. It now appears that Isbrandtsen is contemplating an increase in its service to one per week.

An article by Richard P. Cook appeared in the issue of the Wall Street Journal for Friday, November 14, 1952, which stated that it was based upon interviews with Mr. Hans Isbrandtsen, the President of Isbrandtsen, and other persons in the Isbrandtsen organization. In this article, among other statements, appears the following with relation to around-the-world service which includes the trade from Japan to United States Gulf and Atlantic ports:

"The company is soon increasing this service to a sailing every ten days and may later move to one a week."

A Conference representative has further reported that Mr. Hans Isbrandtsen, during his recent visit in Japan, stated to Japanese shippers that the company expected to increase its service to one sailing per week.

As would be expected in the light of known principles of steamship economics, Isbrandtsen has obtained very satisfactory cargoes for its increasingly numerous sailings. Attached hereto, made a part hereof, and marked Exhibit G, is a schedule comparing the total non-Conference carryings (Isbrandtsen) with the total Conference carryings in revenue tons from June, 1951, to September, 1952, both months inclusive. In this Exhibit will also appear, in column 5, the percentage of total liner carryings transported by non-Conference vessels and in column 6 the percentage of total liner carryings transported by Conference vessels. In column 7 appears the number of Conference members with sailings during the respective months and in column 8 the average percentage of the total liner carryings per Conference member with sailings during the relevant month. At the foot of columns 2, 3 and 4 will be found total figures

which embrace the carryings from June, 1951, to September, 1952, both months inclusive. The aggregate liner carryings during this period amount to 456,310 payable tons. Of this, the Conference members carried the aggregate of only 316,618 revenue tons or 69.4% of the total (foot of column 6); whereas, Isbrandtsen alone carried 139,692 revenue tons or 30.6% of the total (foot of column 5). An examination of columns 5 and 8 indicates that in many months Isbrandtsen has carried well above one-third of all of the liner carryings; whereas, the Conference members who had sailings in the respective months on the average have not carried as much as 10% since the month of June, 1951.

Perhaps the most significant figures in Exhibit G are those which appear in footnotes 4 and 5. There it appears that the average carryings of Conference vessels have been 1,208.5 revenue tons; whereas, the average carryings of Isbrandtsen vessels have been 4,989.8 tons per sailing.

Exhibit H sets forth statistics of tramp carryings in the Conference Trade for the months of March and September in the years 1949 to 1952, inclusive. Exhibit H (footnote 1) also indicates, to the extent that the data is available, the rates charged for carriage on the tramps and the Conference tariff rates at the times when the respective tramp vessels were operated. The Exhibit indicates the extent to which the Conference lines are subjected to tramp competition in addition to the non-Conference liner competition.

The Conference members are of the view that if a system of contract/non-contract rates were introduced in accordance with the proposal set forth in this statement, a very considerable addition to liner carryings would be effected.

(f) Conclusion

The above statements and the Exhibits A to H inclusive demonstrate beyond peradventure that the Conference, over the years, has been devoted to the rendition of a regular, frequent and dependable service in the Conference Trade,

and to the maintenance of stability of rates which is necessary to the conduct of business in that trade.

Since 1948 the Conference members, despite the investment of huge sums in the construction of especially adapted and speedy vessels for operation in the Conference Trade, have seen their business inordinately impaired by a non-Conference competitor, whose competitive method is the cutting of rates by a general policy of uniformly deducting a fraction from Conference rates. As above stated, this competitive method has been soundly condemned by the agencies charged with the administration of the Shipping Act, 1916, as amended. The non-Conference competitor has been able to increase his sailings from one to three a month and is now preparing to increase his sailings to one per week.

Upon recognized principles of steamship economics, there is not the slightest doubt that if the Conference lines continue to maintain the stability which has prevailed even under the Isbrandtsen assault upon their business, Isbrandtsen will be able further to increase its sailings until it will have gained a virtual monopoly of all of the carryings in the Conference Trade.

It is clear that the Conference members cannot permit this course to continue. Due to the necessary delays in the institution of the contract system and the constant disturbances in the Conference Trade, a move has already been suggested by Conference members who are wholeheartedly devoted to the conference principle, that the time has arrived to declare all rates open so that the Conference members shall be able to compete with Isbrandtsen on a rate basis.

Many of the Conference members recall their experience with meeting Isbrandtsen on the basis of cut rate for cut rate, in the out-bound Far East Trade, with the resultant rate war. The history of this experience was written large in the records of the predecessor of the Federal Maritime

Board, in Docket 128, 1 U.S.S.B.B. 470 (1935); and we refer to the portion of Docket 128 which deals with the rate war in the outward trade corresponding to the Conference Trade. We respectfully request that that portion of the report in Docket 128 be incorporated herein, and made a part hereof. Such a rate war is an imminent reality, unless the curative effects of a contract system may be applied to this troubled arm of the commerce of the United States.

The reasons for the use of contract/non-contract rates in the Conference Trade are, therefore, these: (i) to enable the Conference members to continue in business in the Conference Trade, notwithstanding non-Conference rate practices; (ii) to enable the Conference members to continue the policy of investing increasingly large sums in modern, speedy and efficient vessels, especially adapted to service in the Conference Trade; (iii) to enable the Conference members to continue, in the future, the record of stability of rates over long periods of time, in accordance with the traditional Conference policy, as demonstrated by Exhibit B, so as to insure the progressive growth and prosperity of commerce between Japan and the Atlantic and Gulf Coasts of the United States; (iv) to prevent the outbreak of a rate war which is bound to result if the Conference lines meet Isbrandtsen's rate cuts with corresponding rate cuts—all to the great detriment of the carriers themselves and to the commerce which it is their duty to serve.

2. The Basis for the Spread or Differential in the Conference Trade

(a) General

A statement of the basis for the spread or differential in the Conference Trade requires the statement both of principles of law and considerations of fact. We shall deal with these two classes of substantive matters in the order above stated.

(b) Principles of Law

The legal basis for the establishment of contract and non-contract rates, with respect to the same commodities, is to be found in the opinion of Mr. Justice Stone in *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297 (1937). At page 303, Mr. Justice Stone stated that without explanation and reason the assessment of different charges for identical services and facilities would be undue and unreasonable discrimination. His language in this particular follows:

"The differential between appellants' rates on commodities transported under contract and the rates on the same commodities for non-contract shippers was *prima facie* discriminatory since the two rates were charged for identical services and facilities, and the narrow issue presented to the Secretary for decision was whether, in the conditions affecting the traffic involved, the discrimination was undue or unreasonable."

The learned Justice did not, however, leave unanswered the question of the factual issue to be determined in deciding, in each particular case, whether the spread between the contract and non-contract rates is undue and unreasonable. Thus, he stated, at page 304:

"In determining whether the present discrimination was undue or unreasonable the Secretary was called upon to ascertain whether its effect was to exclude other carriers from the traffic, and if so, whether, as appellants urge, it operated to secure stability of rates with consequent stability of service, and, so far as either effect was found to ensue, to weigh the disadvantages of the former against the advantages of the latter."

It is clear from the foregoing that a spread of rates might be justified if stability of rates is requisite and desirable, even if the effect might be "to exclude other carriers from the traffic". Where, as here, there is no desire or intent to exclude any competitor, Conference or non-Conference, from the traffic, but merely to prevent non-Conference competitors from taking away all of the business of the Con-

ference lines by improper rate cutting practices, the question of whether the spread is undue or unreasonable substantially answers itself. Nor can it be stated that any spread, however wide, is unreasonable *per se* because it is adopted for the purpose of preventing Conference line shippers from patronizing the non-Conference competitor.

In *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474 (1932), the case came up on a demurrer to the complaint. Therefore, the Supreme Court was required to consider all of the allegations of the complaint to be true. As appears at pages 479 to 480, the allegations of the complaint included the following:

"The conspiracy involves the establishment of a general tariff rate and a lower contract rate, the latter to be made available only to shippers who agree to confine their shipments to the lines of respondents. *The differentials thus created between the two rates are not predicated upon volume of traffic or frequency or regularity of shipment, but are purely arbitrary and wholly disproportionate to any difference in service rendered, the sole consideration being their effect as a coercive measure. The tariff rate in numerous instances is as much as one hundred per cent higher than the contract rate.* The disproportionately wide spread of these differentials is wholly arbitrary and unreasonable. The respondents have put into effect what is called a scheme of joint exclusive patronage contracts, by which shippers are required to agree to ship exclusively by their lines, and to refrain from offering any shipments to petitioner. Unless they so agree, the shippers are forced to pay the far higher general tariff rates. This plan is resorted to for the purpose of coercing shippers to deal exclusively with respondents and refrain from shipping by the vessels of petitioner, and thus exclude it entirely from the carrying trade between the United States and Great Britain." (Italics supplied.)

Thus the Supreme Court was considering a complaint which alleged that the differentials in some cases amounted to 100% of the contract rate and that the differentials were wholly disproportionate to any difference in service ren-

dered. Nevertheless, the Court held that it would be competent for the Shipping Board, upon a proper showing of historical and economic facts, to determine that a contract system, with such differentials, is legal and proper.

In *United States* v. *Far East Conference*, 342 U. S. 570 (1952), the case again came before the Court on a motion to dismiss the complaint. There, too, therefore, the Supreme Court was required to take as true all of the allegations in the complaint. In the *Far East* case, the complaint alleged that "By their combined economic power, exerted through the aforesaid *coercive rate differentials*, the defendants [Conference members] have, pursuant to the combination and conspiracy herein alleged, induced and compelled shippers in the outbound Far East trade to enter into freight agreements with the defendant Far East Conference * * *." (Italics supplied.) Nonetheless, the Supreme Court reaffirmed the doctrine of *United States Navigation Co.* v. *Cunard S. S. Co.*, that the Board might, upon proof of proper economic and historical facts, approve the action of the Conference members.

Nor did *Isbrandtsen Co., Inc.* v. *United States*, 96 F. Supp. 888 (1951), affirmed by an evenly divided court, *sub nom., A/S J. Ludwig Mowinckles, Rederi* v. *Isbrandtsen Co., Inc.* and *Federal Maritime Board* v. *United States*, 342 U. S. 950 (1952), change the law on this subject. Judge Frank, speaking for the three-judge District Court, there merely held:

"But the Board has made a finding, and the evidence before the Examiner shows that the announced contract and non-contract rates of the conference carriers, acting pursuant to the dual-rate provisions of the conference agreements, were such that the spread between those rates was arbitrary."

The above language of Judge Frank referred to an item of testimony which characterized as arbitrary the manner in which the differential there involved had been arrived at.

His opinion did not purport to determine what type of spread might be reasonable and justifiable upon any other record or in any other conference trade. His opinion attempted to lay down no general principle of law governing the spread between contract and non-contract rates. If Judge Frank had attempted to state that a 20% rate differential was illegal and unreasonable *per se*, he would have been flying in the face of the decision of the Supreme Court in *United States Navigation Co.* v. *Cunard S. S. Co.* and would have been reaching a conclusion at variance with the later decision of the Supreme Court in *Far East Conference* v. *United States.*

The affirmance of Judge Frank's opinion by an equally divided court deprives that decision of all authority in any other cases.

In *United States* v. *Pink*, 315 U. S. 203, 216 (1942), the Supreme Court, in considering the effect of an affirmance, by an evenly divided court, said:

"Nor was our affirmance of the judgment in that case by an equally divided court an authoritative precedent. While it was conclusive and binding upon the parties as respects that controversy (*Durant* v. *Essex Company*, 7 Wall. 107), the lack of an agreement by a majority of the Court on the principles of law involved prevents it from being an authoritative determination for other cases. * * *"

The effect of an affirmance by an evenly divided court was similarly stated in *Hertz* v. *Woodman*, 218 U. S. 205, 212-215 (1910).

It follows that even if the District Court in the *Isbrandtsen* case had attempted to lay down any general principles of law affecting the quantum of a spread, it would have no governing effect here. There is, therefore, no legal basis upon which it can be contended that the Board should not here approve the spread between contract and non-contract rates in the amount of 9½% of the contract rates.

There is one other matter of law to which it is essential to call the Board's attention, before proceeding with the factual data applicable to the Conference Trade.

In matters of rate making, the question of reasonableness is not and cannot be a matter of finding a single pinpoint at which the spread between rates is reasonable and above or below which it ceases to be reasonable. The courts have dealt with reasonableness in matters of rate making as constituting a band, zone, or area so that any pinpoint, as it were, within the band, would be reasonable.

An illustrative case is *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246 (1951), in which the Court said (at p. 251):

"Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high. To reduce the abstract concept of reasonableness to concrete expression in dollars and cents is the function of the Commission. It is not the disembodied 'reasonableness' but that standard when embodied in a rate which the Commission accepts or determines that governs the rights of buyer and seller. A court may think a different level more reasonable. But the prescription of the statute is a standard for the Commission to apply and, independently of Commission action, creates no right which courts may enforce."

This same doctrine also found expression in *Georgia* v. *Pennsylvania Railroad Co.*, 324 U. S. 439 (1945), where the Court said (at pp. 460-1):

"The fact that the rates which have been fixed may or may not be held unlawful by the Commission is immaterial to the issue before us. The *Keogh* case indicates that even a combination to fix reasonable and non-discriminatory rates may be illegal. 260 U. S., p. 161. The reason is that the Interstate Commerce Act does not provide remedies for the correction of all the abuses of rate-making which might constitute violations of the anti-trust laws. *Thus a 'zone of reasonableness exists between maxima and minima*

within which a carrier is ordinarily free to adjust its charges for itself.' United States v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 506." (Italics supplied.)

The task before the Board in the consideration of this Statement is, therefore, not to find that the spread of 9½%, here proposed, is the *only* spread which would be reasonable. Its task is to determine whether the 9½% spread is within that zone, band, or area of reasonableness which the law, as well as common sense, dictates to be the standard of reasonableness which must be applied to the function of rate making; for rates and the spread between rates must be fixed by practical men in the competitive arena of international shipping, and not in the laboratory of the scientist or the ivory tower of the philosopher.

(c) Factual Considerations

i) *General*

There are certain factual considerations which must be taken into account in connection with determining whether any spread is or is not reasonable. These considerations help to set the boundaries around the area within which any spread might be determined to be reasonable. In the instant case we not only have the guidance of these general considerations, but also have the factors which enable this Conference to pinpoint 9½% of the contract rates as that focus in the general area of reasonableness at which the spread must be established. We shall consider, first, those factual elements having to do with the area of reasonableness and, secondly, those which led to the determination of the 9½% proposal.

ii) *Reasonableness from the Standpoint of the Shipper*.

We have noted above that Isbrandtsen openly and notoriously conducts its business on the basis of rates computed at 10% below the corresponding Conference rates. It has announced its intention, upon the adoption of the contract

system by the Conference, of charging 10% below Conference contract rates.

These circumstances offer to the Japanese shipper an alternative: either to ship all of his commodities by Conference tonnage at contract rates, or to ship as great a volume as possible of his shipments by Isbrandtsen's vessels at 10% below contract rates and to ship the balance of his requirements by Conference tonnage at non-contract rates. If the shipper chooses to use cut rate Isbrandtsen service to the maximum extent, he still has the advantage of employing the speedy, regular and well-equipped Conference services, when it serves his interests to do so.

Under such circumstances the shipper is confronted with alternatives which, in each case, may require a nice balancing of the advantages of becoming a contract shipper against the advantages of remaining a non-contract shipper. The proposed non-contract rate is 9½% above the proposed contract rate. Isbrandtsen has announced that its rates will be 10% under the proposed contract rate. The shipper will, therefore, compare these two figures in determining whether or not he desires to become a contract shipper. On the side of remaining a non-contract shipper, he will place such advantages as he may attribute to complete freedom of action. On the side of becoming a contract shipper he will place the advantages to himself and to the commerce of his country, which derive from long term stability of rates.

From this standpoint, it becomes immediately apparent that the proposed 9½% spread is the minimum which could be regarded as in any way likely to accomplish the recognized advantages of the contract/non-contract system of rates as stated in the *Swayne & Hoyt* case. A very considerably higher differential, percentagewise, would definitely fall within the area of reasonableness.

(iii) *Reasonableness from the Standpoint of the Carrier*

The question of reasonableness of spread, from the carrier's standpoint, has two principal aspects. First, the interaction between spread, additional cargo attracted, and reduction in operating costs per unit of cargo. Under existing conditions, above described, the vessels of the Conference lines are not able to fill all of the cargo space which they are prepared to allocate to Japan. Necessary and irreducible operating costs (hereinafter referred to as Fixed Costs) must, therefore, be allocated to the units of cargo carried. As the cargoes increase, the same Fixed Costs being allocated among a greater number of units show a decrease per unit. Conversely, as cargoes decrease, the same Fixed Costs, being allocated among a lesser number of units, exhibit an increase per unit. What these Fixed Costs are varies according to the type of vessel, her age, the scale of wages of her officers and crew and numerous other factors.

Reference again to Exhibits G and H indicates the possible aggregate carryings to which the Conference members may legitimately aspire, entirely disregarding the probable increase in the overall commerce between Japan and the United States. Taking into consideration the cargo which the Conference members are confident the re-institution of the contract system will return to their services, it is the opinion of the Conference that the decrease in Fixed Costs per unit of cargo which will result from the re-institution of the contract system will justify the 9½% spread.

Another consideration, from the standpoint of the carriers, must be taken into account. Hereinabove, we have delineated the development of the Conference carriers—the provision for exceptional speed, the reefer capacity, the silk rooms, and the vast increase in the bale capacity. The commerce between Japan and the United States cannot prosper unless the Conference lines can find economic inducement toward progressively more modern tonnage, always espe-

cially adapted to the requirements of the trade. Inducement to such progress can be found only in the assurance to the Conference carriers of a continuous and dependable volume of cargo, such as that which would be shipped by the shippers of Japan, pursuant to contracts entered into under tariffs providing for a consideration of a minimum of 9½% spread between contract and non-contract rates.

(iv) *Reasonableness from the Standpoint of Both Shipper and Carrier*

The tariffs providing for contract and non-contract rates, which the Conference is proposing by this Statement, were not prepared by the Conference in any hasty attempt to meet the grievous situation which has been prevailing due to the Isbrandtsen competition. The tariff is the result of a study instituted by the Rate Committee of the Conference. This study occupied a period of approximately two months. The tariff which the Committee proposed and which the Conference adopted is not, in any sense, makeshift. It is not based solely upon pre-existing rates. It is the result, rather, of a study of the competitive conditions involving the movement of the respective commodities enumerated in the tariff.

The Board will recall that, in October, 1950, the Conference undertook that it would not institute a contract/non-contract system except upon sixty days' prior notice to the Board. This sixty days' notice was given to the Board on or about September 15, 1952, prior to the promulgation of General Order 76. The sixty days mentioned in the notice expired on November 14th. It was during this sixty day period that the Conference Committee, above referred to, performed its principal labors. But for the promulgation of General Order 76, the contract/non-contract system would have become effective on November 15, 1952.

Due, however, to be the promulgation of General Order 76 on November 11, 1952, the Conference did not put its new

contract/non-contract system into effect on November 15. Inasmuch, however, as the merchants interested in the Conference Trade had been informed of the new contract rates which would have become effective under the contract system but for the foregoing circumstances, the Conference has made available the rates which would have become the contract rates on November 15 had the system gone into effect on that date.

It is our conviction that a comparison between the level of the proposed new non-contract rates and the old tariff rates which had been in effect immediately prior to November 15, 1952, tells an eloquent story. Comparison between the new proposed non-contract rates and the old tariff rates indicates that, with respect to thirteen commodities, the new non-contract rates are equal to the old tariff rates; that with respect to 131 items the new non-contract rates are lower and, in a major portion of the instances, substantially lower than the old tariff rates; that with respect to 173 cases the new proposed non-contract rates are higher than the old tariff rates; but in the preponderant majority of these cases the amounts of the excess are 25¢, 50¢, 75¢ or $1.00.

Annexed hereto and marked Exhibit I is a table indicating the frequency distribution of each difference, positive and negative, between the old tariff rate and the corresponding proposed new non-contract rate.

From Exhibit I it is apparent that in the main the new non-contract rates do not vary substantially from the old tariff rates; that there are only a very few instances in which the new non-contract rates are substantially higher than the old tariff rates; and that there is a very considerable number of commodities with respect to which the new non-contract rates are drastically below the old tariff rates.

Inasmuch as, during the period from June, 1951, to September, 1952, both inclusive, 69.4% of the cargoes in the Conference Trade has been moving at the old tariff rates

(see Exhibit G), it immediately becomes apparent that the new non-contract rates are rates at which cargoes will freely flow in the Conference Trade, particularly inasmuch as those who pay these rates have the corresponding advantage of shipping by non-Conference or tramp tonnage at will. Likewise, since the proposed new contract rates are substantially as low as, or lower, than the pre-November 15th Isbrantsen rates at which (during the same period) approximately 30.6% of the traffic in the Conference Trade has been moving (see Exhibit G), it is obvious that cargoes will flow freely at the new contract rates. We have here, then, two rates which have been standing side by side, at each of which substantial amounts of cargo have been flowing in this very trade. There, therefore, can be no question, not alone that both of these rates fall within the area of reasonableness for rates but also that the differential between these two reasonable levels of rates itself falls within the area of reasonableness for the spread or differential between rates.

(v) *The Basis for the Selection of 9½% as the Exact Differential*

Under the foregoing heads, we trust that we have demonstrated that 9½% of the proposed contract rates is a spread or differential which, together with spreads or differentials computed on perhaps a considerable number of other formulae, would have fallen within the zone or area of reasonableness for spreads. Some formulae which would have resulted in spreads considerably in excess of that here proposed would have found justification in reason and in the economic factors which affect the commerce from Japan to the Atlantic and Gulf Coasts of the United States.

The differential of exactly 9½% of the contract rate, rather than any of the other differentials which might thus have been justified, was arrived at for two reasons: First, it cannot be over-emphasized that the carriers in the Conference Trade are subject to regulation, not only by the

Federal Maritime Board, pursuant to the Shipping Act, 1916, as amended, and the Merchant Marine Acts, but also by the Fair Trade Commission of Japan and by the Japanese Ministry of Transportation, under statutes duly adopted by the legislative body of Japan.

The Conference has been advised by William Logan, Esq., that the aforesaid Japanese authorities cannot reasonably be expected to regard favorably any spread or differential in excess of 9½%, at this time. Mr. Logan, resident in Tokyo, Japan, is a member of the firm of Hunt, Hill and Betts, Esqs., having law offices in New York, N. Y., and in Tokyo. Mr. Logan, who was retained by the Conference to advise it in regard to the aspects of Japanese law having to do with the adoption of the contract system, is conducting all proceedings before and in connection with the Japanese authorities, having to do with or arising out of the adoption of the contract system.

Second, a consultation with representatives of a considerable number of Japanese shippers and representatives of shippers' organizations in Japan, has elicited the information that the exporters in the Conference Trade regard a differential of approximately 10% as reasonable; as being, generally speaking, in accord with discounts allowed commercially in Japan to so-called "regular good customers". Such shippers and shippers' representatives were particularly favorable to the exact differential of 9½% for the reason that the same differential had been introduced since the adoption of the aforesaid laws by a number of other Conferences involving most important segments of the Japanese foreign trade.

D

COPY OF THE FORM OF CONTRACT PERTAINING TO THE PROPOSED CONTRACT/NON-CONTRACT RATES

Attached hereto and marked Exhibit J is a copy of the form of contract which will be tendered to the shippers in the Conference Trade.

Dated: December 23rd, 1952.

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE
By JAMES A. DENNEAN
James A. Dennean, U. S. Secretary
and Authorized Official

STATE OF NEW YORK
COUNTY OF NEW YORK ss.:

JAMES A. DENNEAN, being first duly sworn, deposes and says: That he is an authorized official, to wit: the Secretary for the United States, of the Japan-Atlantic and Gulf Freight Conference, and is the person who signed the foregoing Statement, on behalf of said Conference; that he has read the Statement and that the facts set forth without qualification are true, and that the facts stated therein upon information received from others, affiant believes to be true.

JAMES A. DENNEAN.

Sworn to before me this
23rd day of December, 1952.
JOSEPH CATALANOTTO
Notary Public, State of New York
Qualified in Kings County
No. 24-5650425
Certs. filed with Queens, New York
Bronx, Richmond, Westchester
Suffolk & Nassau Co. Clerks
Queens, New York, Kings, Bronx Reg's
Commission expires March 30, 1954

(CIRCULAR)

EXHIBIT C

MITSUBISHI SOKO KAISHA
Yokohama.

TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN
JAPAN-ATLANTIC COAST FREIGHT CONFERENCE

Dear Sirs:

With a view to stabilizing the freight market for the benefit of all parties concerned and at the same time taking into consideration the interests of the supporters of the Conference lines named below, we have pleasure in announcing to your goodselves that the Tariffs of the Trans-Pacific Freight Conference of Japan and the Japan Atlantic Coast Freight Conference have been thoroughly revised and brought up to date and both Tariffs are to be placed under joint general Contract Scheme.

The new Tariffs, which are to become effective as from the 15th inst., are now being printed and will be distributed as soon as they are ready, but in the meantime we hasten to intimate to your goodselves the general outline of the new tariffs as follows:—

(1) With a few exceptions, Contract and Non-Contract rates have been established on every commodity in the Tariffs.

(2) Contract rates on many commodities have been reduced as will be seen from the following list, whereas the Contract rate on all other commodities remain the same as in the present Tariffs.

Trans-Pacific Tariff

Commodity	Coast Current Rate	Coast New Contract Rate	Overland Current Rate	Overland New Contract Rate
Antimony Ware	U.S.G. $10.00	U.S.G. $ 9.00	U.S.G. $ 0.75	U.S.G. $0.70
Bamboo blinds, etc.	6.00	5.00	0.60	0.50
Brushes	13.00	12.00	1.25	1.10
Brush Handles	13.00	12.00	0.70	0.65
Calcium Cyanide	6.00	5.00	——	5.00
Camphor	12.00	8.00	——	8.00
Chillies	13.00	10.00	13.00	10.00
Cotton Goods	9.50	8.50	1.10	1.00
Earthenware, etc.	4.00	3.00	0.50	0.40
Hats (Formosa and Panama)	20.00	12.00	3.00	2.00
" (Straw and P. leaf)	9.00	5.00	2.00	2.00
" (N. O. S.)	20.00	13.00	3.60	2.50
Hemp Braid, etc.	13.00	10.00	1.25	1.25
Lacquered Ware	8.50	7.00	0.85	0.75
Menthol Crystal	16.00	16.00	1.50	1.20
Oil (essential)	16.00	16.00	1.50	1.20
" (Camphor)	16.00	8.00	16.00	8.00
" (in bulk)	8.00	6.00	8.00	6.00
Onions	7.00	6.50	——	6.50
Oysters	7.00	6.00	7.00	6.00
Paper Articles	8.00	7.50	1.10	0.90
Pyrethrum Flowers	6.00	5.50	0.30	——
Sand	6.00	3.00	——	3.00
Silk Goods, Fuji and Pongee	18.00 plus ½%	15.00	2.25	2.00
Skins and Furs	20.00 plus ½%	15.00 plus ½%	20.00 plus ½%	15.00 plus ½%
Steel Bar, etc.	7.00	5.00	7.00	5.00
Tea Dust	5.00	4.50	5.00	4.50

Atlantic Tariff

Commodity	Current Rate	New Contract Rate
Bamboo Rakes	U.S.G. $10.30	U.S.G. $ 9.00
Bean Cake and Meal	10.00	8.00
Camphor	12.00	10.00
Chillies	30.00	20.00
Festoons	10.00	7.00
Hats (Panama, etc.)	16.00 or 2%	16.00
" (Straw)	16.00	8.00
Hides	12.00	10.00
Oil (Vegetable and Fish)	9.00	8.00

EXHIBIT C

MITSUBISHI SOKO KAISHA
Yokohama.

Commodity	Current Rate	New Contract Rate
Oil (Camphor	U.S.G. $16.00	U.S.G. $10.00
" (Bean and Fish in bulk)	15.00	10.00
" (other oil in bulk)	17.00	13.00
Palm Leaves	13.00	12.00
Seeds Meal	9.00	8.00
Tea Dust	10.00	9.50
Cheap Porcelain	10.50	8.00
Earthenware	10.50	8.00
Paper Articles	10.50	10.00
Metal Ornaments	10.50	10.00
Wooden Ware	10.50	10.00
Lacquered Ware	10.50	10.00
Pin Cushion	10.50	10.00

(3). Non-Contract rates will be approximately 30% higher than Contract Rates.

(4) Other terms and conditions are as per the Contract Form attached hereto.

We would esteem it a favour if you would be good enough to sign the Contract Form herewith submitted, as soon as possible to enable us to make arrangements for putting the new Tariffs into force on the aforementioned date of 15th inst:

Yours faithfully,

American Mail Line
Barber-Wilhelmsen Line
Canadian Pacific S. S. Ltd.
Dollar Steamship Line
"K" Line
Kokusai Kisen Kaisha
Nippon Yusen Kaisha
Osaka Shosen Kaisha

For and on behalf of the Trans-Pacific Freight Conference of Japan:

Barber-Wilhelmsen Line
Dollar Steamship Line
Kokusai Kisen Kaisha
Nippon Yusen Kaisha
Osaka Shosen Kaisha

For and on behalf of the Japan Atlantic Coast Freight Conference

TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN
JAPAN-ATLANTIC COAST FREIGHT CONFERENCE

MEMORANDUM OF AGREEMENT, whereby the undersigned Conference steamship Lines agree to carry and the undersigned Shippers and Exporters, their subsidiary Companies or Agents, agree to ship exclusively by vessels of the said Conference Steamship Lines from Japan Ports all commodities to the destinations and at the Contract rates of freight or Ocean proportional rate of freight as set forth in the respective Tariffs No. 9 issued November 15th, 1931, supplements thereto or reissues thereof.

THIS AGREEMENT and all rates and conditions expressed in the respective Tariffs No. 9 to be effective November 15th, 1931 and to remain in effect for one year subject to the terms of clause in paragraph No. 4.

The Non-Contract rates of freight for shipments as set forth in the Trans-Pacific and Japan-Atlantic Tariffs No. 9 referred to above will be strictly applied by all the undersigned Conference Steamship Lines on shipments by Shippers or Exporters not signatory hereto, or who do not, in accordance with this agreement, confine all their shipments to vessels of the Conference Steamship Lines.

Ninety days notice shall be given to the undersigned Shippers and Exporters before the undersigned Conference Steamship Lines alter the rates of freight above referred to.

American Mail Line
Barber-Wilhelmsen Line
Canadian Pacific S. S. Ltd.
Dollar Steamship Line
"K" Line
Kokusai Kisen Kaisha
Nippon Yusen Kaisha
Osaka Shosen Kaisha

Barber-Wilhelmsen Line
Dollar Steamship Line
Kokusai Kisen Kaisha
Nippon Yusen Kaisha
Osaka Shosen Kaisha

For and on behalf of the Trans-Pacific Freight Conference of Japan.
K. Watanabe
Secretary

For and on behalf of the Japan-Atlantic Coast Freight Conference.
K. Watanabe
Secretary

We confirm our acceptance of the foregoing contract.

.....
Shippers

Date .....

.....
Address

Note:—Shippers are requested to note that until further notice the Mitsui Bussan Kaisha Shipping Department are participating carries[*sic*] with the Conference Lines.

EXHIBIT D

Conference Sailings in the Conference Trade*

Month		Total	Month		Total
Jan.	1949	10	Dec.	1950	11
Feb.	"	9	Jan.	1951	11
Mar.	"	10	Feb.	"	14
Apr.	"	7	Mar.	"	15
May	"	9	Apr.	"	10
June	"	7	May	"	13
July	"	9	June	"	12
Aug.	"	6	July	"	16
Sept.	"	10	Aug.	"	19
Oct.	"	12	Sept.	"	18
Nov.	"	11	Oct.	"	12
Dec.	"	8	Nov.	"	18
Jan.	1950	8	Dec.	"	18
Feb.	"	9	Jan.	1952	14
Mar.	"	8	Feb.	"	18
Apr.	"	10	Mar.	"	15
May	"	15	Apr.	"	12
June	"	13	May	"	15
July	"	11	June	"	17
Aug.	"	13	July	"	19
Sept.	"	12	Aug.	"	20
Oct.	"	15	Sept.	"	19
Nov.	"	15			

* These records are based on Statistics of Cargo Movements From Japan published monthly by the Conference for the period from January 1949 to the present, the issue for September, 1952, being the latest thus far published.

In order to qualify as one sailing, a carrier, who at any given time, was a member of the Conference must have berthed a vessel at one or more Japanese ports and have actually loaded cargo destined for U. S. Atlantic and/or U. S. Gulf Coast Ports. In the case where a vessel may have loaded cargo at two or more ports and such loading extended from the end of one month into the next, credit for the sailing was given to that month in which the vessel was present in the majority of the Japanese ports of call. If this resulted in an equal division between two months, the month within which the vessel called at Yokohama, the principal Japanese port, was credited with the sailing. If this still did not result in a credit to one of two months, the first call at Yokohama was decisive. For the months of January, 1949, and September, 1952, the first and last months, respectively, covered herein, all sailings which could not be connected with sailings during the subsequent and prior months, respectively, were credited to January, 1949, and September, 1952, respectively.

A number of the carriers who were, from time to time, members of this Conference, were also members of the Trans-Pacific Freight Conferenc of Japan. As members of the latter Conference they berthed vessels which carried cargo, destined for Atlantic and Gulf Coast Ports, to Pacific Coast ports whence it was trans-shipped by inter-coastal carrier to its ultimate destination. These events are not given weight in the above computations.

A number of Conference members operated in the trade from Japan to Atlantic and Gulf Coast Ports by utilizing the Suez Canal. Pursuant to the definition of one sailing, herein stated, these are not given any weight in determining sailing opportunities in the Conference Trade, above, unless cargo actually moved to a Conference destination.

Commodity	Rate Basis	Conference Pac.	Conference O.C.P.	Conference Atl.	Isbrandtsen Pac.	Isbrandtsen O.C.P.	Isbrandtsen Atl.	Item No.
Agar Agar	W/M	$32.25		$42.00	$29.05		$37.80	9
Aluminum Manufactures of (excluding sheets, bars and ingots)	W/M	33.00		36.75	29.70		33.10	10a
Aluminum, N. O. S. (incl. Scrap)	2240 lbs. or 40 cft.	20.75	$18.75	23.75	20.75	$18.75	23.75	10
Antimony Ware	W/M	36.25		45.00	32.65		40.50	15
Artificial Flowers, value not exceeding $150.00 per ton W/M	W/M				22.55	19.15	28.90	25a
Artificial Flowers, value exceeding $150.00 per ton W/M	W/M	26.50	22.50	34.00	23.85	20.25	30.60	25
Bags (Shopping), Chip, Grass, Paper & Straw	W/M	23.50	23.00	31.25	21.15	20.70	28.15	40
Bamboo, also Wooden Blinds, Screens and Shades, incl. semi-manufactures thereof	W/M	25.00	23.00	30.00	23.00	21.75	27.00	45
Bamboo Brushes, Scrub (Sasara)	W/M	24.25		32.50	21.85		29.25	48
Bamboo Dryers, Lamp Stands, Rakes, Scrapers	W/M	21.25	20.00	30.50	19.75		27.75	50
Bamboo Poles and Sticks, Plain, Raw, with no Metal or other attachments	W/M	20.00	18.75	28.00	18.00		25.50	53
Bamboo Ware, N. O. S.	W/M	25.00	23.00	32.25	23.00		29.50	55
Baskets, Chip: Easter, Willow and N. O. S.	W/M	22.75	21.25	31.25	20.75	19.25	28.50	65
Beer	W/M	28.50		36.50	25.65		32.85	89
Binoculars and Opera Glasses, value $500.00 or more F. O. B. Japan loading port, per ton 40 cft.	W/M	53.75		69.75	48.40		62.80	102
Braid, Chip and Straw, incl. manufactures thereof N. O. S.	W/M	32.75	30.00	39.75	29.50	27.00	35.80	120

Commodity	Rate Basis	Conference			Isbrandtsen			Item No.
		Pac.	O.C.P.	Atl.	Pac.	O.C.P.	Atl.	
Braid, Hemp and Pedaline	W/M	$47.75	$42.50	$61.50	$43.00	$38.25	$55.35	122
Braid, Paper and Wool	W/M	46.75		61.25	42.10		55.15	124
Braid, N. O. S.	W/M	46.75		61.25	42.10		55.15	126
Brass N. O. S. (Incl. Scrap)	2240 lbs. or 40 cft.	20.75	18.75	23.75	20.75	18.75	23.75	127
Brass Ware	W/M	36.25		45.00	32.65		40.50	128
Brass Castings and Stampings (for plumbing purposes), incl. Aluminum Pipe Fittings	W/M	24.50		28.50	22.05		25.65	129
Cameras	W/M	53.75		69.75	48.40		62.80	169
Canned Bamboo Sprouts, Canned Fish and Shell Fish, Canned Fruits, Canned Jams, Canned Vegetables	W/M	39.75	37.75	50.50	35.80	34.00	45.45	175
Canned Foodstuffs, N. O. S.	W/M	48.75	43.00	61.50	43.90	38.70	55.35	182
Cargo N. O. S. (Articles not otherwise specified in Index)	W/M	48.25		56.25	43.45		50.65	191
Carvings, Bone	W/M	30.00	26.00	37.50	27.00	23.40	33.75	193
Chemicals, N. O. S. (Non-Dangerous, Non-Inflammable, Non-Corrosive)	W/M	36.75		47.25	33.10		42.55	216
Chillies	W	74.25		85.00	66.85		76.50	221
Chip Blinds	W/M	32.75		42.00	29.50		37.80	225
Clocks and Watches	W/M	53.75		69.75	48.40		62.80	235
Cotton Manufactures: Bags, Blankets, Canvas, Gloves, Hosiery, Napkins, Napkin Sets, Piece Goods, Table Cloths, Towels, Twine, Wearing Apparel, Yarn and N. O. S.	W/M	32.50		47.50	29.25		42.75	260
Cotton and Rayon Manufactures: Bed Spreads, Damask Sets, Elastic Web, Napkins, Napkin Sets, Table Cloths and N. O. S.	W/M	53.00	45.25	68.50	47.70	40.75	61.65	270
Cotton and Staple Fibre Mixed Goods; Cotton and Staple Fibre Mixed Yarns	W/M	53.00	51.75	68.50	47.70	46.60	61.65	275

Commodity	Rate Basis	Conference			Isbrandtsen			Item No.
		Pac.	O.C.P.	Atl.	Pac.	O.C.P.	Atl.	
Dangerous Cargo, N. O. S.	W/M	$146.25		$190.75	$131.65		$171.70	290
Dolls, Bisque	W/M	27.50	$23.50	35.00	24.75	$21.15	31.50	297
Drugs, Medicines, Patent Preparations, etc.	W/M	68.25		83.25	61.45		74.95	300
Easter Novelties: Cotton and Rayon Bunnies, Chicks, etc. includes Valentine, St. Patrick's, Washington's Birthday, etc. Souvenirs and Articles	W/M	25.00	21.00	32.50	23.00	19.00	30.00	312
Electrical Bulbs, incl. X'mas Tree Electric Bulbs	W/M	28.50		36.50	25.65		32.85	315
Feathers	M	47.50	39.75	53.75	42.75	35.80	48.40	332
Ferro Chromium, Ferro Manganese, Ferro Phosphorus, Ferro Silico Manganese, Ferro Silicon Manganese	W/M	28.25		34.00	25.25		30.60	340
Ferro Tungsten	W/M	65.00		52.00	58.50		46.80	341
Festoons	W/M	23.50	22.50	31.25	21.15	20.25	28.15	347
Fireworks (As described by U. S. Dept. of Commerce in Miscellaneous Series No. 92, "Stowage of Ship Cargoes", Item 1514 of Issue 1920, supplements or additions thereto)	W/M	42.00	39.00	47.75	37.80	35.10	43.00	353
Fishing Guts, Bamboo Fishing Poles, Lines and Parts; Fishing Poles	W/M	53.25		69.25	47.95		62.35	360
Ginger, Dried	W/M	39.75		45.00	35.80		40.50	383
Glass Manufactures: Ash Trays, Lamp Stands and Parts, and N. O. S. for cheap Stem Ware, see Item No. 675	W/M	29.50		37.50	26.55		33.75	385
Groceries and Provisions (not canned goods)	W/M	38.25		49.25	34.45		44.35	408
Hair, Animal, including Horse and Rabbit	W/M	33.75		45.75	30.40		41.20	412

Commodity	Rate Basis	Conference Pac.	Conference O.C.P.	Conference Atl.	Isbrandtsen Pac.	Isbrandtsen O.C.P.	Isbrandtsen Atl.	Item No.
Hardware, viz., Screws, Padlocks, Bolts and Nuts, Window Fittings and Hinges of Iron or Brass	W/M	$37.00	$35.00	$45.00	$33.30	$31.50	$40.50	421
Hats, Chip and Straw	W/M	31.25		39.25	28.15		35.35	427
Household Goods (See Rule 22)	W/M	44.75		69.00	40.30		62.10	447
Imitation Pearl Bracelets and Necklaces	W/M	53.75		69.75	48.40		62.80	461
Insect Powder	W/M	43.75		57.50	39.40		51.75	467
Iron Wire and Steel Wire, incl. Wire Rods	W	24.00		32.00	21.60		29.80	479
Lacquer Ware, N. O. S.	W/M	35.50	31.50	44.75	31.95	28.35	40.30	500
Lamp Shades; Lamp Shades, Paper	W/M	43.25		55.25	38.95		49.75	505
Lanterns	W/M	27.00	20.75	33.75	24.30	18.70	30.40	507
Lanterns, Hurricane	W/M	36.25		45.00	32.65		40.50	508
Linen Goods	W/M	53.75	46.00	66.50	48.40	41.40	59.85	525
Loofahs	W/M	43.25		57.00	38.95		51.30	527
Lumber, Loose	M Bft.	47.75		67.25	43.00		60.55	529
Lumber, viz: Bundled—not more than 400 F. B. M. or less than 350 F. B. M. each, weight not exceeding 1500 lbs.	M Bft.	45.00		41.00	40.50		36.90	530
Machinery	W/M	30.75		42.75	27.70		38.50	531
Machines, Sewing; Heads & Parts	W/M	30.75		42.75	27.70		38.50	532
Mats, Table, Grass and Straw	W/M	19.75	18.50	27.00	17.80	16.65	24.30	555
Matting; Matting, Chip	W/M	19.75	18.50	27.00	17.80	16.65	24.30	557
Metal Ware, N. O. S.	W/M	36.25		45.00	32.65		40.50	580
Microscopes, Toy	M	43.75		57.50	39.40		51.75	582
Minimum Charge for One B/L	B/L	14.25		21.25	14.25		21.25	586
Monosodium Glutamate or "Ajinomoto"	W/M	53.75		69.75	48.80		62.80	593
Naphthalene	W/M	36.25		40.00	32.65		45.00W	599
Needles; Phonograph Needles; Needles and Threaders	W/M	39.75		49.50	35.80		44.55	601

Commodity	Rate Basis	Conference Pac.	Conference O.C.P.	Conference Atl.	Isbrandtsen Pac.	Isbrandtsen O.C.P.	Isbrandtsen Atl.	Item No.
Novelties and Ornaments, Tissue Covered (Silk, Rayon, Cotton Mixed, Leather and Imitation Leather), Boxes, Bags, Cases, Pincushions, Emery Bags, etc.	W/M	$30.00	$26.00	$37.50	$27.00	$23.40	$33.75	603
Oil, Fish and Vegetable, in Containers (not including Fish Liver, Shark Liver or Whale Liver Oil)	W/M	30.00		38.50	27.00		34.65	613
Oil, Fish Liver, Shark Liver and Whale Liver, in containers: including Fish or Sea Animal Oils, blended								
8,000 units USP or lower	W/M	33.75		44.75	30.40		40.30	614
8,001 units to 15,000 units USP	W/M	45.25		57.75	40.75		52.00	
15,001 units to 25,000 units USP	W/M	60.25		76.75	54.25		69.10	
25,000 units USP and over	W/M	103.25		111.50	92.95		100.35	
Paper Manufactures:								
Cellophane, Fans, Filter, Jam Jars, Napkins, Shaving Articles N. O. S.	W/M	37.00	35.00	45.50	33.30	31.50	40.95	635
Cellophane Paper (New York Only)	W/M						32.50	635a
Personal Effects	W/M	44.75		69.00	40.30		62.10	662
Pipe, Cast Iron	W/M	21.50		30.25	19.35		27.25	65
Pipe Fittings, Malleable Cast Iron	W/M	32.75		41.50	29.50		37.35	667
Pipe, Steel	W/M	25.75		33.75	23.20		30.40	669
Porcelainware, Earthenware, Chinaware, Crockery, Rockingham Ware, including Manufactures of the foregoing, viz., Ash Trays, Dolls and toys, Lamp Stands (without metal equipment and wiring), Novelties, Ornaments, and Pottery, Value not exceeding $100.00 per 40 cft.	W/M	23.25	21.75	28.75	20.95	19.60	25.90(1)	675
Value exceeding $100.00 but not exceeding $275.00 per 40 cft.	W/M	28.00	27.00	34.50	25.20	24.30	28.25(2)	
Value exceeding $275.00 per 40	W/M	38.75	37.75	45.25	34.90	34.00	40.75(3)	

Remarks: Isb. only will take different valuation of $125.00 for rate (1). For Cheap Stemware. Value not exceeding $125.00 Isb. will apply the rate (1)

[3*sic*4]

Commodity	Rate Basis	Conference			Isbrandtsen			Item No.
		Pac.	O.C.P.	Atl.	Pac.	O.C.P.	Atl.	
Rackets, Shuttlecocks and Nets, Tennis and Badminton	W/M	$42.75		$50.75	$38.50		$45.75	691
Rags, Cotton, Roofing and Wiping	W/M	20.25	$18.25	27.00	18.25	$15.45	24.30	693
Rayon Manufactures: Elastic Web, Gloves, Mats, Piece Goods Wearing Apparel and Yarn, N. O. S.	W/M	53.00	57.00	68.50	47.70	40.75	61.65	705
Rayon and Woolen Mixed Goods	W/M	52.00		68.25	46.80		61.45	711
Rubber Articles, N. O. S. incl. Tennis and Beach Balls	W/M	36.25		47.25	32.65		42.55	728
Rugs: Cotton, Jute, Paper, Rag, Rice Straw and Straw Fibre	W/M	20.25	18.25	27.00	18.25	16.45	24.30	745
Rugs, Ramie and Wool, Staple Fibre & Wool	W/M	36.00		46.00	32.40		41.40	747
Rugs, Ramie, Ramie & Wool, Rayon, and Wool	W/M	44.00	42.00	60.00	39.60	37.80	54.00	750
Sake	W/M	45.75		61.25	41.20		55.15	755
Shoyu	W/M	37.75		49.25	34.00		44.35	784
Silk Piece Goods (Woven with Fibre, wholly or chiefly of Silk Tussah, Dupion and/or Spun Silk)	W/M	75.50		93.75	67.95		84.40	792
Silk Wearing apparel incl. Mufflers Handkerchiefs and Scarves	W/M	89.00		111.25	80.10		100.15	795
Silk Noils and Silk Waste (excluding Silk Noils Piece Goods)	W/M	43.00	37.25	53.25	38.70	33.55	47.95	797
Silk, Mixed spun and Staple Fibre Yarn	W/M	71.00		93.25	63.90		83.95	799
Silk, Raw, Tussah, Wild Dupion and Spun	C	7.75	6.75	11.50	7.00	6.10	10.35	801
Silk & Rayon Mixed Goods; Silk & Rayon Mixed Piece Goods	W/M	71.50		93.25	64.35		83.95	805
Silk Staple Fibre Mixed Goods; Silk Staple Fibre Mixed Piece Goods	W/M	71.50		93.25	64.35		83.95	807

Commodity	Rate Basis	Conference			Isbrandtsen			Item No.
		Pac.	O.C.P.	Atl.	Pac.	O.C.P.	Atl.	
Silk, Thrown (Crepe Yarn)	C.	$12.75		$16.75	$11.50		$15.10	809
Silk, Spun & Wool Mixed Yarn	W/M	90.00		111.25	81.00		100.15	811
Skins & Furs in Cases	W/M	74.50		90.00	67.05		81.00	815
Skins & Furs in Bales	W/M	65.50		80.00	58.95		72.00	816
Hides, Dry in Bales	W/M	42.00		48.50	37.80		43.65	817
Hides, Dry in Cases	W/M	34.00		57.50	30.60		51.75	818
Slippers, Grass, Straw, Towelling, Wool, without Leather or Rubber Soles	W/M	31.00	$27.00	39.75	27.90	$24.30	35.80	819
Slippers, Grass, Straw, Towelling, Wool, with Leather or Rubber Soles	W/M	38.50	34.50	52.50	34.65	31.05	47.25	
Slippers, N. O. S.	W/M	43.75		57.50	39.40		51.75	821
Sporting Goods, N. O. S.	W/M	53.75		69.75	48.40		62.80	845
Stationery and Stationery Supplies	W/M	42.75		55.25	38.50		49.75	860
Steel and/or Iron Bars, Plates, Sheets, N. O. S. (Including Galvanized Iron Sheets)	2240 lbs. or 40 cft.	15.00		23.00	15.00		23.00	863
Table Tennis Balls, Ping Pong Balls, Celluloid	M	36.50			32.85			875
Toys and Games (Children's) N. O. S.	W/M	25.00	21.00	32.50	23.00	19.00	30.00	905

Commodity	Rate Basis	Conference Pac.	Conference O.C.P.	Conference Atl.	Isbrandtsen Pac.	Isbrandtsen O.C.P.	Isbrandtsen Atl.	Item No.
Trays, Wood, Undecorated	W/M	31.00		37.50	29.90		33.75	906
Walnuts, in Shells	W	80.50	71.75	87.75	72.45	64.60	79.00	933
Walnuts, without shells	W/M	44.00	42.00	46.75	39.60	37.80	42.10	935
Wood, Ply (including Wallboard)	W/M	30.00		38.50	27.00		34.65	946
Wood Panels; Wood Veneer	W/M	40.00	34.25	45.25	36.00	30.85	40.75	947
Wood Manufactures:								
Bowls (Plain or varnished), Canes (Walking), Coaster Sets, Chesterfield Canes, Hakone Boxes, Hangers, Lamp Stands, Nut Crackers, Salad Sets, Spoons and Forks, Tie Racks, Tooth Picks, Sticks, Trays, Woodenware, Wooden Ship Models, Zig-Zag Rules, N. O. S. Value not exceeding $125.00 per ton	W/M				$20.95	$19.60	$25.90	950
Value exceeding $125.00 but not exceeding $275.00 per ton	W/M				25.20	24.30	28.25	
Value exceeding $275.00 per ton	W/M	$40.00	$34.25	$45.25	36.00	30.85	40.75	
Woolen Manufactures:								
Gloves, Hosiery, Piece Goods, Woolen Top & Carding Yarn, N. O. S.	W/M	56.25		72.25	50.65		60.30	955
Wool Noils	W/M	44.00	42.00	60.00	41.40	37.80	54.00	957
X'mas Ornaments:								
Cotton and Rayon Santa Claus, Decorated Paper and Tinsel Balls, Snow Balls, Paper Houses, etc. X'mas Glass Ornaments and Figures, Tree Ornaments and Hollow Glass (not incl. X'mas Tree Electric Bulbs). Excludes all Artificial Flowers and Leaves	W/M	25.00	21.00	32.50	23.00	19.00	30.00	958

CARRYINGS BY TRAMP VESSELS IN THE TRADE[1] FROM JAPAN TO UNITED STATES ATLANTIC AND GULF COAST PORTS

Month[2]	Cargo Carried[3] in Pounds	Cargo Carried in Short Tons
March 1949	57,416,923	28,708.46
September 1949	885	0.44
March 1950	21,968,790	10,984.40
September 1950	26,929,670	13,464.84
March 1951	181,671	90.84
September 1951	902,775	401.39
March 1952	21,477,990	10,739.00
September 1952	26,433,780	13,216.89

FOOTNOTES:

[1] This data was obtained from the United States Department of Commerce, Bureau of Census, unpublished Report SM-303. United States General Imports of Merchandise on Vessels by Type of Vessel Service by Domestic Port of Unlading by Foreign Port of Lading by Schedule T Commodity.

The Conference has no available source of information as to the rates charged for the transportation of all of the cargoes whose weights are stated above. Certain information, however, is available and we append this information as being pertinent upon the question to which this statement is directed:

Name of Tramp	Month	Type of Cargo	Rate	Conference Rate Then in Effect
Pacific Maru	September 1951	Scrap Iron and Steel	$16.00 per long ton (berth terms)	$17.25 per long ton
Nichigyoku Maru	" "	Scrap Iron and Steel	$16.00 per long ton (berth tons)	$17.25 per long ton
Alice Brown	December 1951	Steel Plates	$20.00 per long ton (berth terms)	$23.00 per long ton or measurement ton.
Union Power	January 1952	Cargo Steel Plates and Steel Pipe	$17.00 per long ton F.I.O.	Then in Effect $23.00 per long ton or measurement ton
Mariam	August 1952	Steel Plates	$5.50 per long ton F.I.O.	$23.00 per long ton or measurement ton
Hai Chang	" "	" "	Rate unknown	$23.00 per long ton or measurement ton
Cabanos	" "	" "	Approx. $60,000. lump sum for approx. 9,400 measurement tons	$23.00 per long ton or measurement ton
Kaiyo Maru	" "	Steel	$12.00 per long ton (berth terms)	$23.00 per long ton or measurement ton
Haiyo Maru	October 1952	Steel and Wire Rods	$12.50 per long ton (berth terms)	$23.00 per long ton or measurement ton
			$12.50 per long ton (berth terms)	$32.00 per short ton

[2] The months of March and September were selected at random in order to reflect some of the tramp carryings in the trade during the post-World War II period.

[3] The carryings in the Bureau of Census unpublished Report SM-303 are shown in pounds. When a comparison is made between carryings by tramp vessels shown in this exhibit with the Conference and non-Conference liner carryings shown in Exhibit G, account should be taken of the fact that the liner carryings are shown in units of "revenue tons"

Exhibit A

Conference Agreements and Membership of the Japan-Atlantic and Gulf Freight Conference[1]

Agreement Number	Date of Approval by F. M. B. or Its Predecessors	Initial Members	Admitted Members	Date of Commencement of Membership	Date of Termination of Membership
73	February 16, 1926[2]	Barber Steamship Lines		February 16, 1926	February 16, 1926
		Nippon Yusen Kaisha		" " "	September 3, 1929
		Osaka Shosen Kaisha		" " "	" " "
			American Pioneer Line	" " "	February 1, 1928
129	September 4, 1929	Barber Steamship Lines, Inc.		September 4, 1929	May 12, 1931
		Nippon Yusen Kaisha		" " "	" " "
		Osaka Shosen Kaisha		" " "	" " "
154	May 13, 1931	Barber-Wilhelmsen Line		May 13, 1931	June 24, 1934
		Dollar Steamship Lines, Inc., Ltd.		" " "	" " "
		Nippon Yusen Kaisha		" " "	" " "
		Osaka Shosen Kaisha		" " "	" " "
			Kokusai Kisen Kaisha	August 1, 1931	" " "
			Kawasaki Kisen Kaisha	September 16, 1932	" " "
3103	June 25, 1934	Mitsui Bussan Kaisha, Ltd.		June 25, 1934	December 11, 1941
			Mitsui Steamship Co., Ltd.	June 28, 1951	still in effect
		Kawasaki Kisen Kaisha, Ltd.		June 25, 1934	December 11, 1941
			Kawasaki Kisen Kaisha	June 13, 1952	still in effect
		Kokusai Kisen Kaisha		June 25, 1934	December 11, 1941
			Kokusai Line[3]	July 2, 1951	still in effect
		Nippon Yusen Kaisha		June 25, 1934	December 11, 1941
			Nippon Yusen Kaisha	June 28, 1951	still in effect
		Osaka Shosen Kaisha, Kobe		June 25, 1934	December 11, 1941
			O. S. K.—Shinnihon New York Line[4]	July 19, 1951	August 21, 1952
			Osaka Shosen Kaisha, Ltd.	August 22, 1952	still in effect
			Shinnihon Steamship Co., Ltd.	" " "	" " "
		Barber-Wilhelmsen Line[5]		June 25, 1934	" " "
		American President Lines, Ltd.[6]		" " "	" " "
		A. P. Moller, Maersk Line[7]		September 20, 1937	" " "
			United Ocean Transport Co., Ltd.	June 26, 1934	December 11, 1941
			Yamashita Kisen Kaisha	May 1, 1935	" " "
			" " "	June 13, 1952	still in effect
			Waterman Steamship Corporation	October 10, 1946	" " "
			Prince Line, Ltd.	August 31, 1948	January 10, 1953[8]
			Lancashire Shipping Company, Ltd.	December 13, 1948	November 29, 1952
			Lykes Bros. Steamship Co., Inc.	December 27, 1946	still in effect
			United States Lines Company (American Pioneer Line)	" " "	" " "
			States Marine Corporation and States Marine Corporation of Delaware[9]	October 14, 1947	" " "
			Ivaran Lines-Far East Service[10]	May 1, 1948	" " "
			Salen-Skaugen Line[11]	May 28, 1949	June 15, 1951
			De La Rama Lines[12]	" " "	still in effect
			Daido Kaiun Kaisha	June 25, 1952	" " "

FOOTNOTES:

1 This name came into effect on August 27, 1952, on which date the Federal Maritime Board approved an agreement amending the Conference's basic Agreement No. 3103. At all times prior thereto, the Conference was named "Japan-Atlantic Coast Freight Conference".

2 Date of final approval, the agreement having received conditional approval on December 18, 1925.

3 This is the trade name for the following companies who hold one Conference Joint Service membership: Nissan Kisen Kaisha, Ltd.; Toho Kaiun Kaisha, Ltd.; Iino Kaiun Kaisha, Ltd.; Mitsubishi Kaiun Kaisha, Ltd.; and Kokusai Kaiun Kaisha, Ltd.

4 This is the trade name for the following companies who held one Conference Joint Service membership: Osaka Shosen Kaisha, Ltd.; and Shinnihon Steamship Co., Ltd.

5 This is the trade name for the following companies who hold one Conference Joint Service membership: Wilhelmsens Dampskibsaktieselskab; A/S Den Norske Afrika-og Australielinie; A/S Tonsberg; A/S Tankfart I; A/S Tankfart IV; A/S Tankfart V; A/S Tankfart VI; Skibasktieselskapet Varild; Skibasktieselskapet Marina; Aktieselskabet Glittre; Dampskibsinteressentskabet Garonne; Skibsaktieselskapet Sangstad; Skibsaktieselskapet Solstad; Skibsaktieselskapet Siljestad; Damskibsaktieselskabet International; Skibsabtieselskapet Mandeville; and Skibsabtieselskapet Goodwill. The Conference membership was originally held in the name of Barber-Wilhelmsen Line; however, effective December 27, 1946, the membership name was changed to that of the first seven of the companies listed above as the present day Joint Service parties. The present Joint Service agreement came into effect on May 19, 1950.

6 The membership was originally listed in the name of Dollar Steamship Lines, Inc., Ltd. and effective November 21, 1938, the name was changed to its present form, as here shown.

7 This is the trade name for the following companies who hold one Conference Joint Service membership: Dampskibsselskabet af 1912 Aktieselskab; and Aktieselskabet Dampskibsselskabet Svendborg.

8 Effective date of termination of membership pursuant to notice of resignation given to the Conference.

9 Present name came into effect on April 28, 1948. At all times prior thereto membership held in the name of States Marine Corporation.

10 This is the trade name for the following companies who hold one Conference Joint Service membership: Skibsaktieselskapet Igadi; A/S Besco; Akttieselskapet Ivarans Rederi; and A/S Lise. Prior to March 31, 1949, the Joint Service consisted of the following three parties: Skibsaktieselskapet Igadi; A/S Besco; and Aktieselskapet Ivarans.

11 This is the trade name for the following companies who held one Conference Joint Service membership: Rederi A. B. Pulp; Rederi A. B. Jamaica; Salamis A/S; and D/S A/S Eikland.

12 This is the trade name for the following companies who hold one Conference Joint Service membership: The De La Rama Steamship Company, Inc.; The Ocean Steam Ship Co., Ltd.; The China Mutual Steam Navigation Co., Ltd.; Nederlandsche Stoomvaart Maatschappij "Oceaan" N. V.; and Swedish East Asia Co., Ltd. Prior to March 29, 1950,

Exhibit B

Rates Charged by the Japan-Atlantic and Gulf Freight Conference and Its Predecessors[1] for the Carriage of Ten Representative Commodities[2] in the Trade

Commodity	Feb. 16, 1923 to Effective Date of Tariff No. 6	Tariff No. 6[3]	Tariff No. 8[11] Nov. 1, 1930	[16]Tariff No. 10[18] Sept. 1, 1934	Tariff No. 11[14] May 1, 1935	Addenda to Tariff No. 11	Tariff No. 12[14] May 1, 1937	Tariff No. 13[14] June 16, 1937	[29]Tariff No. 14[14] June 20, 1938	Tariff No. 15[14] Dec. 1, 1939	Tariff No. 16[14] July 1, 1940	Tariff No. 17[14] July 1, 1941
1. Porcelain (Cheap)	10.50 m[4]	10.50 m[7]	10.50 m[7]	C. 8.00 m[16] N. C. 11.00 m	C. 9.00 m N. C. 12.00 m[16]	C. 9.00 m[23] N. C. 12.00 m	C. 10.00 m N. C. 12.00 m	C. 10.00 m N. C. 12.00 m	C. 10.00 m N. C. 12.00 m	C. 12.00 m N. C. 14.50 m	C. 12.50 m[21] N. C. 14.50 m	C. 12.50 m[21] N. C. 14.50 m
2. Celluloid Toys	10.50 m	10.50 m[8]	C. 9.00 m[12] N. C. 14.00 m	C. 9.00 m[17] N. C. 12.00 m	C. 10.00 m[17] N. C. 13.00 m	C. 10.00 m[26] N. C. 13.00 m	C. 12.00 m N. C. 14.00 m	C. 12.00 m[17] N. C. 14.00 m	C. 12.00 m[17] N. C. 14.00 m	C. 14.00 m[17] N. C. 17.00 m	C. 14.50 m[17][22] N. C. 16.50 m	C. 14.50 m[26] N. C. 16.50 m
3. General Cargo (N. O. S.)	16.00 t/m[5]	16.00 t/m	16.00 t/m	C. 18.00 w/m[18] N. C. 23.00 w/m	C. 20.00 w/m N. C. 25.00 w/m	C. 20.00 w/m N. C. 25.00 w/m	C. 20.00 t/m[18] N. C. 25.00 t/m	C. 20.00 t/m N. C. 25.00 t/m	C. 20.00 t/m N. C. 25.00 t/m	C. 25.00 t/m N. C. 30.00 t/m	C. 29.00 t/m N. C. 34.50 t/m	C. 29.00 t/m N. C. 34.50 t/m
4. Canned Goods (Crab Meat and Tuna Fish)		C. 10.50 m N. C. 14.50 m[9]	C. 10.00 m N. C. 14.50 m[13]	C. 9.50 m N. C. 14.50 m[19]	C. 13.50 m N. C. 17.50 m	C. 17.00 m N. C. 17.50 m	C. 16.00 m[27] N. C. 19.00 m	C. 16.00 m[27] N. C. 18.00 m	C. 16.00 m[27] N. C. 18.00 m	C. 18.00 m[26] N. C. 21.50 m	C. 20.50 m[23] N. C. 24.50 m	C. 20.50 m[23] N. C. 24.50 m
5. Raw Silk		6.00 t/cwt	6.00 cwt	C. 4.00 cwt N. C. 6.00 cwt	C. 4.00 cwt N. C. 6.00 cwt	C. 4.00 cwt N. C. 6.00 cwt	C. 4.00 cwt N. C. 6.00 cwt	C. 4.00 cwt N. C. 6.00 cwt	C. 4.00 cwt N. C. 6.00 cwt	C. 6.00 cwt N. C. 7.00 cwt	C. 6.00 cwt N. C. 9.00 cwt	C. 6.50 cwt N. C. 9.50 cwt
6. Metal Ware		16.00 t/m[10]	16.00 t/m[10]	C. 10.00 m[20] N. C. 13.00 m	C. 12.00 m[20] N. C. 16.00 m	C. 12.00 m N. C. 16.00 m	C. 14.00 m[20] N. C. 16.00 m	C. 14.00 m[20] N. C. 16.00 m	C. 14.00 m[20] N. C. 16.00 m	C. 16.00 m[20] N. C. 19.00 m	C. 18.50 m[20][24] N. C. 22.00 m	C. 18.50 m[26] N. C. 22.00 m
7. Bamboo Ware		12.00 m	12.00 m	C. 9.00 m[22] N. C. 12.00 m	C. 8.00 m[25] N. C. 11.00 m	C. 11.00 m N. C. 13.00 m	C. 11.00 m N. C. 13.00 m	C. 11.00 m N. C. 13.00 m	C. 11.00 m N. C. 13.00 m	C. 13.00 m N. C. 15.50 m	C. 13.50 m N. C. 15.50 m	C. 13.50 m N. C. 15.50 m
8. Cold Storage Cargo (Frozen Fish)		16.00 t/m[10]	16.00 t/m[10]	C. 30.00 m[21] N. C. 40.00 m	C. 33.00 m N. C. 42.00 m	C. 33.00 m N. C. 42.00 m	C. 40.00 m[21] N. C. 44.00 m	C. 40.00 m[21] N. C. 44.00 m	C. 40.00 t[29] N. C. 44.00 t	C. 44.00 t N. C. 53.00 t	C. 50.50 t N. C. 61.00 t	C. 50.50 t N. C. 61.00 t
9. Machinery		22.00 t/m or 2½ ad val.	16.00 t/m[10]	C. 18.00 w/m[15] N. C. 23.00 w/m	C. 20.00 w/m[15] N. C. 25.00 w/m	C. 15.00 w/m[28] N. C. 20.00 w/m	C. 17.00 t/m N. C. 19.00 t/m	C. 17.00 t/m N. C. 19.00 t/m	C. 17.00 t/m N. C. 19.00 t/m	C. 19.00 t/m N. C. 23.00 t/m	C. 22.00 t/m N. C. 26.50 t/m	C. 22.00 t/m N. C. 26.50 t/m
10. Cotton Goods		16.00 m	16.00 m	C. 16.00 m N. C. 21.00 m	C. 18.00 m N. C. 24.00 m	C. 18.00 m N. C. 24.00 m	C. 20.00 m N. C. 24.00 m	C. 20.00 m N. C. 24.00 m	C. 20.00 m N. C. 24.00 m	C. 24.00 m N. C. 29.00 m	C. 27.00 m N. C. 30.00 m	C. 27.00 m N. C. 30.00 m

35

Exhibit B

nference and Its Predecessors[1] for the Carriage of Ten Representative Commodities[2] in the Trade from Japan to United States Atlantic and Gulf Coast Ports

Commodity	[16]Tariff No. 13[14] June 16, 1937	[29]Tariff No. 14[14] June 20, 1938	Tariff No. 15[14] Dec. 1, 1939	Tariff No. 16[14] July 1, 1940	Tariff No. 17[14] July 1, 1941	Tariff No. 18[27] May 1, 1948	Addenda to Tariff No. 18	Tariff No. 19 July 10, 1948	Addenda to Tariff No. 19	Addenda to Tariff No. 19	Tariff No. 20 February 15, 1951	Addenda to Tariff No. 20	Addenda to Tariff No. 20	Rates in Effect on November 14, 1952
1. Porcelain (Cheap)	C. 10.00 m N. C. 12.00 m	C. 10.00 m N. C. 12.00 m	C. 12.00 m N. C. 14.50 m	C. 12.50 m[21] N. C. 14.50 m	C. 12.50 m[21] N. C. 14.50 m	39.25 m	30.00 m[39]	30.00 m[41]	30.00 m[42]	25.00 m[46]	28.75 m[47]	28.75 t/m[46]	28.75 t/m	28.75 t/m
2. Celluloid Toys	C. 12.00 m[17] N. C. 14.00 m	C. 12.00 m[17] N. C. 14.00 m	C. 14.00 m[17] N. C. 17.00 m	C. 14.50 m[17][22] N. C. 16.50 m	C. 14.50 m[26] N. C. 16.50 m	22.25 m	22.25 m	25.50 m	25.50 m	25.50 m	29.25 m	31.50 t/m[48]	34.00 t/m[52]	32.50 t/m[54]
3. General Cargo (N. O. S.)	C. 20.00 t/m N. C. 25.00 t/m	C. 20.00 t/m N. C. 25.00 t/m	C. 25.00 t/m N. C. 30.00 t/m	C. 29.00 t/m N. C. 34.50 t/m	C. 29.00 t/m N. C. 34.50 t/m	49.00 t/m	49.00 t/m	56.25 t/m	45.00 t/m[43]	45.00 t/m	51.75 t/m	56.25 t/m[48]	56.25 t/m	56.25 t/m
4. Canned Goods (Crab Meat and Tuna Fish)	C. 16.00 m[27] N. C. 18.00 m	C. 16.00 m[27] N. C. 18.00 m	C. 18.00 m[26] N. C. 21.50 m	C. 20.50 m[23] N. C. 24.50 m	C. 20.50 m[23] N. C. 24.50 m	34.50 m[38]	35.50 m[40]	40.75 m	40.75 m	40.75 m	46.75 m	46.75 t/m[50]	50.50 t/m[49]	50.50 t/m
5. Raw Silk	C. 4.00 cwt N. C. 6.00 cwt	C. 4.00 cwt N. C. 6.00 cwt	C. 6.00 cwt N. C. 7.00 cwt	C. 6.00 cwt N. C. 9.00 cwt	C. 6.50 cwt N. C. 9.50 cwt	8.00 cwt	8.00 cwt	9.25 cwt	open[44]	9.25 cwt[46]	10.75 cwt	11.50 cwt[48]	11.50 cwt[52]	11.50 cwt[53]
6. Metal Ware	C. 14.00 m[20] N. C. 16.00 m	C. 14.00 m[20] N. C. 16.00 m	C. 16.00 m[20] N. C. 19.00 m	C. 18.50 m[20][24] N. C. 22.00 m	C. 18.50 m[26] N. C. 22.00 m	31.25 m	31.25 m	36.00 m	36.00 m	36.00 m	41.50 m	41.50 t/m[50]	45.00 t/m[49]	45.00 t/m
7. Bamboo Ware	C. 11.00 m N. C. 13.00 m	C. 11.00 m N. C. 13.00 m	C. 13.00 m N. C. 15.50 m	C. 13.50 m N. C. 15.50 m	C. 13.50 m N. C. 15.50 m	23.75 m	23.75 m	27.25 m	27.25 m	27.25 m	31.25 m	31.25 t/m[50]	33.50 t/m[49]	32.25 t/m[51]
8. Cold Storage Cargo (Frozen Fish)	C. 40.00 m[21] N. C. 44.00 m	C. 40.00 t[29] N. C. 44.00 t	C. 44.00 t N. C. 53.00 t	C. 50.50 t N. C. 61.00 t	C. 50.50 t N. C. 61.00 t	85.25 t	85.25 t	98.00 t	98.00 t	98.00 t	112.75 t	100.00 t[51]	100.00 t[51]	100.00 t[51]
9. Machinery	C. 17.00 t/m N. C. 19.00 t/m	C. 17.00 t/m N. C. 19.00 t/m	C. 19.00 t/m N. C. 23.00 t/m	C. 22.00 t/m N. C. 26.50 t/m	C. 22.00 t/m N. C. 26.50 t/m	30.00 t/m	30.00 t/m	34.50 t/m	34.50 t/m	34.50 t/m	39.75 t/m	42.75 t/m[49]	42.75 t/m	42.75 t/m
10. Cotton Goods	C. 20.00 m N. C. 24.00 m	C. 20.00 m N. C. 24.00 m	C. 24.00 m N. C. 29.00 m	C. 27.00 m N. C. 30.00 m	C. 27.00 m N. C. 30.00 m	33.75 m	33.75 m	38.75 m	38.75 m	38.75 m	44.50 m	47.50 t/m[50]	47.50 t/m	47.50 t/m

FOOTNOTES:

1 The Japan-Atlantic and Gulf Freight Conference was originally known as the Japan-Atlantic Coast Freight Conference (see fn. 3). This name continued in effect from February 16, 1926, until August 27, 1952, on which date the Federal Maritime Board approved an agreement amending the Conference's basic Agreement No. 3103. This amendatory agreement changed the name of the Conference to its present form.

2 The designated ten commodities were selected as those carried with the greatest frequency and in the greatest volume over the years studied, especially the post-World War II years.

3 On February 16, 1926, the Japan-Atlantic Coast Freight Conference came into formal existence when the United States Shipping Board, predecessor in authority of the present Federal Maritime Board, gave formal approval to the Conference's basic Agreement No. 73. The rates for the three commodities given in this column were obtained from a memorandum prepared in July, 1952, by the Tokyo Office of Nippon Yusen Kaisha. The memorandum, written in Japanese, bears a title which has been translated as "Memorandum on Two Conferences Over the Japan-U. S. Shipping Services". It has as one of its purposes the outlining of the history of the Japan-Atlantic Coast Freight Conference and is based on old documents which that carrier has in its possession. These three rates continued in effect until the effective date of Tariff No. 6 (see fn. 6) where they were republished at the same level. Rates for the other seven commodities for this period could not be obtained.

4 m = per measurement ton of 40 cubic feet.

5 t/m = per short ton of 2,000 pounds or per 40 cft., whichever yields the greater revenue.

6 This tariff is the earliest tariff of which a complete record was found. It is a handwritten tariff which bears the caption of the Japan-Atlantic Coast Freight Conference and states that it "cancels all previous issues". It further states that it was issued by Nippon Yusen Kaisha and Osaka Shosen Kaisha. Unfortunately it bears no date; however, since it gives as the duration of the contract/non-contract rates listed for Lily Bulbs to Atlantic Coast ports as December 31, 1928, it can be definitely stated that the tariff became effective on a date prior thereto. Furthermore, it is known that on February 1, 1928, American Pioneer Line withdrew from the Conference leaving solely N. Y. K. and O. S. K. as members (see Exhibit A). Tariff No. 6, therefore, probably came into effect at some date between February 1, 1928, and December 31, 1928.

7 This is the rate shown for "cheap porcelain", i. e., that having a value of $150.00 or less per measurement ton. Porcelain of greater value carried a rate of $15.00 m.

8 This is the rate shown for "cheap curios and toys", i. e., those having a value of $150.00 or less per 40 cft. Toys of greater value presumably took the General Cargo (N. O. S.) rate.

9 Only the canned crab contract and non-contract rates are shown in the tariff. The duration given is May 31, 1929. Canned crab in the body of the tariff is shown having a rate of $10.00 m. Canned tuna presumably took the General Cargo (N. O. S.) rate.

10 No rate specifically designated. Hence, presumably, it took the General Cargo (N. O. S.) rate.

11 The history of rates between the effective dates of Tariff No. 6 and of Tariff No. 8 is unknown except that the N. Y. K. memorandum (see fn. 3) shows that there was no change in rate for the first three commodities during these years.

12 Celluloid toys were separated and made a separate tariff item apart from other types of toys and curios. The contract and non-contract rates were given as in effect "until further notice". Addendum No. 1 to the tariff, effective April 1, 1931, extended these rates to September 30, 1931.

13 duration to May 31, 1931. Canned crab, in the body of the tariff, is shown as having a rate of $12.50 m.

14 A Joint Tariff of the Trans-Pacific Freight Conference of Japan and the Japan-Atlantic Coast Freight Conference.

15 On April 1, 1931, Addendum No. 1 to Tariff No. 8 took effect. It listed a rate for "Cold Storage Cargo (
Frozen Fish)" of $30.00 t/m. However, since today frozen swordfish in bulk is the item of reefer cargo which
greatest volume, there is here shown only tariff items which embrace this commodity and, therefore, no menti
change is made in the tables. The addendum lists no change in the Ten Representative Commodities, hence
shown in Tariff No. 8 continued in effect until at least April 1, 1931. The history of rates thereafter, until th
date of Tariff No. 10, is unknown.

16 of a value not in excess of $150.00 per 40 cft. Porcelain of greater value presumably took the General Cargo
rate.

17 of a value not in excess of $100.00 per 40 cft. Celluloid toys of greater value presumably took the General Cargo
rate.

18 W/m = per long ton of 2240 pounds or per 40 cft., whichever yields the greater revenue. Rate became effective
1, 1934; the Tariff No. 10 rate in existence prior thereto is not shown.

19 for tuna (maguro). The rate for canned crab was C. $9.25 m, N. C. $14.50 m.

20 of a value not in excess of $175.00 per 40 cft. Metal ware of greater value presumably took the General Cargo
rate.

21 This is the rate given for Cold Storage Fish, other than maguro. Since frozen swordfish in bulk is today'
reefer cargo, that category of Cold Storage Cargo, which embraces this commodity, will be here studied.

22 This is the rate given "Bamboo Poles and Sticks". Bamboo blinds took a rate of C. $12.00 m, N. C. $16.00
bamboo ware presumably took the General Cargo (N. O. S.) rate.

23 Effective July 1, 1936, a rate of C. $10.00 m, N. C. $13.00 m to Gulf ports was established.

24 The old rates continued in effect, the addenda making no mention of any change. Hereinafter, such situat
shown by a notation of the old rates in the addenda columns.

25 Bamboo ware was specifically listed as a tariff item in Addendum No. 2, effective December 1, 1935.

26 Machinery was listed as a specific tariff item by Addendum No. 1, effective August 26, 1935.

27 for canned maguro (tuna). The rate for canned crab was $1.00 higher for both contract and non-contract ca

28 A "Notice to Shippers" dated September 14, 1939, stated that because of current conditions caused by war
the Conference was cancelling all contracts forthwith and that the same rates as the non-contract rates of Ta
would be quoted as new minimum rates on all cargo except raw silk, for ships sailing from any Japanese p
after October 1, 1939. A notice to silk shippers dated September 26, 1939, further stated that, for the same
contracts were being cancelled forthwith and that the same rates as the non-contract rates would be quot
minimum rates on raw silk for ships sailing from any Japanese port on and after November 27, 1939.

29 for fish, other than maguro, in bulk.

30 for canned maguro (tuna). The rate for canned crab was C. $19.00 m, N. C. $23.00 m.

31 of a value not in excess of $150.00 per 40 cft.; for porcelain in excess of this value, contract and non-contract
each $1.00 higher per 40 cft.

32 Effective Oct. 2, 1940, the rate for toys of a value in excess of $100.00 per 40 cft. was C. $15.50 m, N. C. $17.

33 for canned maguro (tuna). The rate for canned crab was C. $21.00 m, N. C. $24.00 m.

34 Effective Oct. 2, 1940, the rate for metal ware of a value in excess of $175.00 per 40 cft. was C. $20.50 m, N.

n April 1, 1931, Addendum No. 1 to Tariff No. 8 took effect. It listed a rate for "Cold Storage Cargo (other than en Fish)" of $30.00 t/m. However, since today frozen swordfish in bulk is the item of reefer cargo which moves in test volume, there is here shown only tariff items which embrace this commodity and, therefore, no mention of this ge is made in the tables. The addendum lists no change in the Ten Representative Commodities, hence the rates n in Tariff No. 8 continued in effect until at least April 1, 1931. The history of rates thereafter, until the effective of Tariff No. 10, is unknown.

value not in excess of $150.00 per 40 cft. Porcelain of greater value presumably took the General Cargo (N. O. S.)

value not in excess of $100.00 per 40 cft. Celluloid toys of greater value presumably took the General Cargo (N. O. S.)

= per long ton of 2240 pounds or per 40 cft., whichever yields the greater revenue. Rate became effective December 34; the Tariff No. 10 rate in existence prior thereto is not shown.

una (maguro). The rate for canned crab was C. $9.25 m, N. C. $14.50 m.

value not in excess of $175.00 per 40 cft. Metal ware of greater value presumably took the General Cargo (N. O. S.)

This is the rate given for Cold Storage Fish, other than maguro. Since frozen swordfish in bulk is today's principal r cargo, that category of Cold Storage Cargo, which embraces this commodity, will be here studied.

This is the rate given "Bamboo Poles and Sticks". Bamboo blinds took a rate of C. $12.00 m, N. C. $16.00 m. Other boo ware presumably took the General Cargo (N. O. S.) rate.

ffective July 1, 1936, a rate of C. $10.00 m, N. C. $13.00 m to Gulf ports was established.

The old rates continued in effect, the addenda making no mention of any change. Hereinafter, such situation will be n by a notation of the old rates in the addenda columns.

amboo ware was specifically listed as a tariff item in Addendum No. 2, effective December 1, 1935.

lachinery was listed as a specific tariff item by Addendum No. 1, effective August 26, 1935.

anned maguro (tuna). The rate for canned crab was $1.00 higher for both contract and non-contract carriage.

"Notice to Shippers" dated September 14, 1939, stated that because of current conditions caused by war in Europe, Conference was cancelling all contracts forthwith and that the same rates as the non-contract rates of Tariff No. 14 d be quoted as new minimum rates on all cargo except raw silk, for ships sailing from any Japanese port, on and October 1, 1939. A notice to silk shippers dated September 26, 1939, further stated that, for the same reason, all acts were being cancelled forthwith and that the same rates as the non-contract rates would be quoted as new mum rates on raw silk for ships sailing from any Japanese port on and after November 27, 1939.

ish, other than maguro, in bulk.

anned maguro (tuna). The rate for canned crab was C. $19.00 m, N. C. $23.00 m.

value not in excess of $150.00 per 40 cft.; for porcelain in excess of this value, contract and non-contract rates were $1.00 higher per 40 cft.

ffective Oct. 2, 1940, the rate for toys of a value in excess of $100.00 per 40 cft. was C. $15.50 m, N. C. $17.50 m.

anned maguro (tuna). The rate for canned crab was C. $21.00 m, N. C. $24.00 m.

ffective Oct. 2, 1940, the rate for metal ware of a value in excess of $175.00 per 40 cft. was C. $20.50 m, N. C. $24.50 m.

35 of a value not in excess of $100.00 per 40 cft.; for celluloid toys in excess of this value, the rate continued as before (see fn. 32), i. e., C. $15.50 m, N. C. $17.50 m.

36 of a value not in excess of $175.00 per 40 cft.; for metal ware in excess of this value, the rate continued as before (see fn. 34), i. e., C. $20.50 m, N. C. $24.50 m.

37 This is the Conference's first post-World War II tariff. Conference sailings having been suspended on or about December 8, 1941, due to the outbreak of war between Japan and the United States. This tariff shows both contract and non-contract rates. However, the contract/non-contract rate system was suspended and the contract rates, which are the only rates shown for all post-World War II tariffs, were made applicable to all shipments; the non-contract rates became entirely academic.

38 Canned crab was $1.00 per 40 cft. higher.

39 Effective May 26, 1948, the prior rate continued in effect for porcelain of a value in excess of $150.00 per 40 cft. The rate here shown is for porcelain of lesser value.

40 Effective February 19, 1947, canned maguro (tuna) was absorbed into the same tariff item number as canned crab and one rate became applicable to both.

41 of a value not in excess of $150.00 per 40 cft.; for porcelain in excess of this value the rate of $39.25 per 40 cft. continued.

42 of a value not in excess of $275.00 per 40 cft.; for porcelain in excess of this value the rate of $39.25 per 40 cft. continued. This change became effective March 31, 1949.

43 Effective June 28, 1950.

44 Effective March 1, 1950, the rate was declared open and it remained thus until September 30, 1950, when the open rate was cancelled.

45 of a value not in excess of $100.00 per 40 cft.; for porcelain in excess of this value, but not in excess of $275.00 per 40 cft., the rate of $30.00 per 40 cft. was established; for porcelain in excess of these values, the rate of $39.25 per 40 cft. was established. These changes became effective August 30, 1950.

46 Effective October 1, 1950 (see fn. 44).

47 of a value not in excess of $100.00 per 40 cft.; for porcelain in excess of this value, but not in excess of $275.00 per 40 cft., the rate of $34.50 per 40 cft. was established; for porcelain in excess of these values, the rate of $45.25 per 40 cft. was established.

48 Effective April 25, 1951; for porcelain of a value not in excess of $100.00 per 40 cft. The rate basis for the other two categories of porcelain, based on value (see fn. 47) was likewise changed to t/m.

49 Effective January 1, 1952.

50 Effective April 25, 1951.

51 Effective June 28, 1951, a new item of "Swordfish" was established under Cold Storage Cargo at this rate. The old rate continued for all other Fish, in Bulk, other than maguro. Effective June 28, 1951, the new item was designated "Swordfish in Bulk or in Cloth Bags." This designation and the rates given for it and for other Fish in Bulk, other than maguro, continues to the present.

52 Effective February 27, 1952. Fifth revised page No. 41 of this tariff showed a rate of $36.00 t/m scheduled to come into effect on this date but before this could take place sixth revised page No. 41 was issued showing this rate as coming into effect on this date. Hence, the rate of $36.00 t/m was a mere paper rate and is not reflected in the above tables.

53 Effective May 30, 1952, a rate of $13.00 cwt. was established from Korea.

54 Effective April 30, 1952.

Exhibit F

ISBRANDTSEN LINE

NEW YORK

INDEPENDENT DEPENDABLE

REGULAR SAILINGS FROM JAPAN

No. 38 Tokyo, November 6, 1952.

WE ARE HAPPY TO ANNOUNCE TO ALL OUR SHIPPERS THAT OUR NEW RATE EFFECTIVE S/S "FLYING CLOUD" WILL BE 10% LESS THAN THE CONFERENCE CONTRACT RATE

TO NEW YORK, NORFOLK, BALTIMORE & PHILADELPHIA VIA SAN FRANCISCO & LOS ANGELES

Vessels	Kobe	Nagoya	Shimizu	Yokohama
S/S FLYING CLOUD	Arrived	Nov. 11		Arr. Nov. 14
	S'ls. Nov. 10	Nov. 12	Nov. 13	S'ls. Nov. 16
S/S FLYING TRADER	Arr. Nov. 21	Nov. 26		Arr. Nov. 29
	S'ls. Nov. 25	Nov. 27	Nov. 28	S'ls. Nov. 30
S/S FLYING ENTERPRISE II	Arr. Dec. 3	Dec. 8		Arr. Dec. 11
	S'ls. Dec. 7	Dec. 9	Dec. 10	S'ls. Dec. 15
S/S FLYING CLIPPER	Arr. Dec. 24	Dec. 27		Arr. Dec. 30
	S'ls. Dec. 26	Dec. 28	Dec. 29	S'ls. Dec. 31
S/S FLYING EAGLE	Arr. Jan. 5 '52	Jan. 11		Arr. Jan. 14
	S'ls. Jan. 10	Jan. 12	Jan. 13	S'ls. Jan. 16

Excellent passenger accommodations are available with private lavatory and shower. To San Francisco $350, to New York $450.

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OSAKA:
No. 7, 10—chome, Koraibashi, Higashi—Ku. Tel. 23—7509
NAGOYA: (Aichi Kaiun)
4,4—chome, Minato-honmachi, Minato-ku. Tel. 6-1601 ~ 5
SHIMIZU: (Shimizu Soko)
2, 1-chome, Hinode-cho Tel. Shimizu 1144 1901

193

580

MATTHEW BENDER & COMPANY MB 57

MICROCARD

TRADE MARK ®

Exhibit G

COMPARISON OF CONFERENCE AND NON-CONFERENCE[1] LINER CARRYINGS IN THE TRADE FROM JAPAN TO UNITED STATES ATLANTIC AND GULF COAST PORTS.

Col. (1)	Col. (2)	Col. (3)	Col. (4)	Col. (5)	Col. (6)	Col. (7)	Col. (8)
Month	Non-Conference[2] Liner Carryings in Revenue Tons	Total Conference Carryings in Revenue Tons	Total Liner Carryings in Revenue Tons [Col. (2) + Col. (3)]	% Non-Conference Carryings [Col. (2) ÷ Col. (4) × 100]	% Conference Carryings [Col. (3) ÷ Col. (4) × 100]	No. of Conference Members with Sailings during Month	Average % of Carryings per Conference Member with Sailings during Month [Col. (6) ÷ Col. (7) × 100]
June 1951[3]	5,214	15,221	20,435	25.5	74.5	7	10.6
July 1951	1,832	20,962	22,794	8.0	92.0	10	9.2
Aug. 1951	6,128	13,341	19,469	31.5	68.5	12	5.7
Sept. 1951	4,564	18,444	23,008	19.8	80.2	11	7.3
Oct. 1951	7,133	14,531	21,664	32.9	67.1	11	6.1
Nov. 1951	12,596	19,562	32,158	39.2	60.8	12	5.1
Dec. 1951	12,005	24,955	36,960	32.5	67.5	11	6.1
Jan. 1952	10,189	16,044	26,233	38.8	61.2	9	6.8
Feb. 1952	10,778	19,419	30,197	35.7	64.3	11	5.8
March 1952	5,482	22,047	27,529	19.9	80.1	10	8.0
April 1952	10,298	18,085	28,383	36.3	63.7	10	6.4
May 1952	9,210	17,738	26,948	34.2	65.8	10	6.6
June 1952	5,952	20,875	26,827	22.2	77.8	11	7.1
July 1952	8,633	22,905	31,538	27.4	72.6	11	6.6
Aug. 1952	14,175	22,505	36,680	38.6	61.4	12	5.1
Sept. 1952	15,503	29,984	45,487	34.1	65.9	12	5.5
Totals June 1951 through Sept. 1952	139,692[4]	316,618[5]	456,310	30.6[6]	69.4[7]		

FOOTNOTES:

1 The only non-Conference carrier engaged in genuine common carrier operations in the Conference Trade during the period above set forth is Isbrandtsen. China Merchants Steam Navigation Co. berthed one vessel during the month of August, 1952, but, so far as the Conference Trade is concerned, this vessel carried only steel sheets to New Orleans; hence, this steamer has been eliminated from the records of liner operations and has been included in tramp operations. Also in the last half of 1950, Pacific Marine Corporation berthed two Liberty vessels, i. e., the S. S. ANNASTA and the S. S. AGATHA at rates 15% under the Conference rates. This company discontinued service as the Liberty ships were unsuitable to the trade and the chartered tonnage appeared not to be adapted to regular service. No further facts with respect to the carryings of the S. S. ANNASTA or the S. S. AGATHA are available.

2 Statistics giving the total of Isbrandtsen's carryings to all of the United States, only, were available. However, experience in this trade, gained by the Conference members, as well as information obtained from Japan, is to the effect that, on a conservative basis, at least 85% of the total United States Isbrandtsen-carried cargo was destined for Atlantic and Gulf Coast ports. Hence the Isbrandtsen carryings shown in this Column were computed on the basis of 85% of Isbrandtsen's total United States carryings from Japan.

3 Complete information concerning the carryings of Isbrandtsen for the period prior to June 1951 was not available. However, it was possible to obtain Isbrandtsen's carryings for the months of January 1949, 1950 and 1951 as well as for the months of July 1949 and 1950. These carryings, when compared with Conference carryings are as follows:

Col. (1)	Col. (2)	Col. (3)	Col. (4)	Col. (5)	Col. (6)	Col. (7)	Col. (8)
Month	Non-Conference Liner Carryings in Revenue Tons	Total Conference Carryings in Revenue Tons	Total Liner Carryings in Revenue Tons [Col. (2) + Col. (3)]	% Non-Conference Carryings [Col. (2) ÷ Col. (4) × 100]	% Conference Carryings [Col. (3) ÷ Col. (4) × 100]	No. of Conference Members with Sailings during Month	Average % of Carryings per Conference Member with Sailings during Month [Col. (6) ÷ Col. (7) × 100]
Jan. 1949	None	7,817	7,817	0	100	5	20.0
July 1949	None	8,445	8,445	0	100	6	16.7
Jan. 1950	9,435	10,429	19,864	47.5	52.5	5	10.5
July 1950	5,364	24,920	30,284	17.7	82.3	8	10.3
Jan. 1951	11,102	15,541	26,643	41.7	58.3	7	8.3

Although Isbrandtsen carried no cargo during the months of January 1949 and July 1949, it did carry cargo during the months of February, March, April, May and June of the year 1949; the size of these carryings, however, is not known.

4 During this period Isbrandtsen had 28 sailings as follows:

Sir John Franklin	(June-July 1951)
Flying Arrow	(August 1951)
Flying Independent	(August-September 1951)
Cape Race	(September 1951)
Flying Clipper	(October 1951)
Flying Trader	(October-November 1951)
Sir John Franklin	(November 1951)
Remsen Heights	(November-December 1951)
Brooklyn Heights	(December 1951)
Flying Arrow	(December 1951)
Flying Independent	(January 1952)
Flying Foam	(January-February 1952)
Flying Clipper	(February 1952)
Flying Trader	(February-March 1952)
Sir John Franklin	(March-April 1952)
Remsen Heights	(April 1952)
Brooklyn Heights	(April-May 1952)
Flying Spray	(May 1952)
Flying Independent	(May-June 1952)
Flying Foam	(June 1952)
Flying Arrow	(July 1952)
Flying Trader	(July 1952)
Flying Clipper	(August 1952)
Sir John Franklin	(August 1952)
Flying Eagle	(August 1952)
Brooklyn Heights	(September 1952)
Remsen Heights	(September 1952)
Flying Spray	(September 1952).

Hence, the average carryings per non-Conference sailing was 4089.8 tons (compare with fn. 5).

5 During this period the Conference members had a total of 262 sailings (see Exhibit D). Hence, the average carrying per Conference sailing was 1,208.5 tons (compare with fn. 4).

6 $\frac{130,602}{456,310} \times 100 = 30.6\%$.

Number of Tariff Items	Difference (−)* Between Proposed Non-Contract Rate and Pre-November 15 Tariff Rate	Number of Items as to Which Proposed Non-Contract Rate Equals Pre-November 15 Tariff Rate	Number of Tariff Items	Difference (Between Prop Non Contra Rate and Pre-Novembe Tariff Rat
1	−$10.75	13	41	+$ .25
1	− 10.50		65	+ .50
1	− 10.25		20	+ .75
1	− 9.50		17	+ 1.00
3	− 7.50		7	+ 1.25
1	− 7.25		4	+ 1.50
2	− 7.00		2	+ 1.75
2	− 6.50		1	+ 2.25
1	− 6.00		1	+ 2.50
2	− 5.75		2	+ 2.75
3	− 5.50		1	+ 3.00
4	− 5.25		2	+ 3.50
1	− 5.00		1	+ 3.75
2	− 4.75		2	+ 4.75
1	− 4.50		1	+ 5.00
1	− 4.25		1	+ 5.25
2	− 4.00		2	+ 5.50
5	− 3.75		1	+ 5.75
3	− 3.50		1	+ 6.00
3	− 3.25		1	+ 6.50
3	− 3.00			
3	− 2.75			
9	− 2.50			
10	− 2.25			
5	− 2.00			
9	− 1.75			
10	− 1.50			
8	− 1.25			
4	− 1.00			
11	− .75			
7	− .50			
11	− .25			

* A minus (−) before an amount indicates that the new non-contract rate is less by amount than the old tariff rate. A plus (+) before an amount indicates that th non-contract rate exceeds the old tariff rate by that amount.

EXHIBIT J

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE AGREEMENT FOR THE CARRIAGE OF FREIGHT

Contract No._____

THIS AGREEMENT MADE BETWEEN_____, hereinafter called the Shipper, and the Members of the Japan-Atlantic and Gulf Freight Conference, hereinafter called the Carriers, provides as follows:

1) The Shipper agrees to forward or cause to be forwarded by vessels of the Carriers all shipments made directly or indirectly by him, his agents, subsidiaries, associated or parent companies, from Japan, Korea and Okinawa to United States Gulf Ports and Atlantic Coast Ports of North America, whether such shipments are made C.I.F., C.&F., F.O.B., ex-godown or by any other terms.

2) The Carriers agree to carry the Shipper's cargoes so far as their regular services are available, at the Contract rates set out in the Tariff of the Japan-Atlantic and Gulf Freight Conference. Rates of freight are subject to reasonable increase. The Carriers undertake to give the Shipper notice of increase by letter, by general posting of revisions of tariff rates in the office of the Secretary, Japan-Atlantic and Gulf Freight Conference, or by press announcement thereof. Increases shall not become effective until the expiration of the calendar month during which notice is given and of the two calendar months next following.

For the purpose of giving the Shipper notices of all changes in rates, the Shipper shall furnish the Conference Secretary a list of commodities in which the Shipper is interested, and the Shipper shall thereafter receive notice of change of rates applicable to said commodities. Should the Carriers during the period of this Agreement reduce rates on any commodity on which Contract rates are applicable, the Shipper shall be given the full benefit of such reduced rates during the period same remain in effect.

3) All Conference rules, regulations, terms and conditions in the Tariff of the Japan-Atlantic and Gulf Freight

Conference and the respective addenda current at the time of shipment of goods are part of this Agreement.

4) The Carriers undertake to maintain a shipping service which shall be adequate to meet the reasonable requirements of the commerce of Japan, Korea and Okinawa moving in the trade specified in Paragraph 1 above. The Shipper may select any vessel in the regular services of the Carriers subject only to mutual agreement as to quantity per vessel and to ability of vessel to carry.

If the Carriers do not furnish space after the Shipper applies therefor, the Shipper may secure space elsewhere without prejudice, provided he first notifies the Secretary, Japan-Atlantic and Gulf Freight Conference, Tokyo, Japan, of his requirement for space and provided the Secretary does not notify him within three (3) days thereafter, excluding Sundays and holidays, of the availability of space on Carriers' vessels within the ensuing fifteen (15) day period.

5) If the Shipper shall make or cause to be made, any shipment in violation of this Agreement, the Shipper shall pay as liquidated damages to the Carriers fifty percentum (50%) of the amount of freight which the Shipper would have paid had such shipment been made in a vessel of the Carriers at the Contract rate currently in effect. Upon failure of the Shipper to pay liquidated damages within thirty (30) days after receipt of demand from the Carriers, the Carriers shall terminate the Shipper's right to the Contract rates until the Shipper pays to the Carriers the amount due. If the Shipper violates this Agreement more than once in any period of twelve (12) months, the Carriers shall cancel this Agreement by serving written notice upon the Shipper. If the Agreement is thus cancelled, the Carriers shall refuse to enter into a new Agreement with the Shipper until any unpaid liquidated damages due to the Carriers have been paid in full.

The Shipper shall, upon request, furnish to the Carriers full and complete information with respect to any shipment

made, or caused to be made, by the Shipper in the trade covered by this Agreement.

6) Notwithstanding any other provision of this Agreement, if the Shipper submits written proof satisfactory to the Secretary of the Japan-Atlantic and Gulf Freight Conference that a foreign buyer on an F.O.B. or F.A.S. shipment from Japan has designated a non-Conference vessel for a shipment, then such shipment will be exempt from this Agreement. The Carriers shall thereafter deny Contract rates on subsequent cargo *consigned to such foreign buyer* on an F.O.B. or F.A.S. basis, in vessels of the Carriers to destinations specified under Paragraph 1 above unless such foreign buyer shall first subscribe to a contract with the Carriers.

7) Shipments under this Agreement are subject to all the terms and conditions of the respective Carrier's engagement note, permit, dock receipt and bill of lading in use by the Carrier when shipments are tendered.

8) The Carriers may cancel this Agreement or suspend service in the event of hostilities or threat thereof which reasonably may be anticipated to affect the trade covered by this Agreement.

9) This Agreement may be terminated by either Party by notice in writing and such termination shall become effective three (3) calendar months after receipt by the other Party of such written notice.

10) Any controversy, claim or dispute arising out of or relating to this Agreement which cannot be settled amicably shall be settled by arbitration in Tokyo, Japan. Each of the interested parties shall within seven (7) days of the filing of a submission or demand for arbitration nominate one arbitrator each who, failing agreement, shall appoint a third arbitrator and the award of the majority shall be binding upon the parties and judgment upon the award rendered may be entered in any court having jurisdiction thereof.

11) Each Member of the Conference is responsible for its own part only in this Agreement. Both the Shipper and the Carriers promise and declare they will faithfully perform and carry out all the obligations and promises on their part to be performed in order to obtain the maximum mutual benefits hereunder.

The Carriers which are Members of the Japan-Atlantic and Gulf Freight Conference at the time of execution of this Agreement are listed below.

Should additional Carriers become Members of the Japan-Atlantic and Gulf Freight Conference after the date of this Agreement, the terms of this Agreement shall apply fully to such Carrier from the date of Membership; should any Carrier cease to be a Member of such Conference, all future rights under this Agreement of such Carrier shall thereupon terminate.

12) The Shipper will indicate for the information of the Conference, the approximate annual tonnage to be moved under this Agreement: Minimum tonnage (2000 lbs. or 40 cu. ft.) Maximum tonnage (2000 lbs. or 40 cu. ft.)

13) The Carriers which are Members of the Japan-Atlantic and Gulf Freight Conference are as follows:.

Executed this_____day of_____19____

_____

Shipper

Shipper's Address(es):

_____

By_____

Title_____

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE

(Revenue Stamp)

_____

Secretary

Port_____

BEFORE THE

FEDERAL MARITIME BOARD

In the Matter of

Statement of

Japan-Atlantic and Gulf Freight Conference
filed under Rule, § 236, Gen. Order 76

Second Further, Amendatory and Supplemental Comments of Isbrandtsen Co., Inc., Relating to the Information Filed, and Protest Against the Conference Being Permitted to Initiate the Proposed Exclusive Patronage Contract/Non-Contract Dual Rate System.

On January 12, 1953, Isbrandtsen Co., Inc. filed herein Comments and Protest, dated that day.

On January 15, 1953, it filed its First further amendatory Comments and Protest.

To those Comments and Protest Isbrandtsen now adds, and filed, the following further, amendatory and supplemental Comments and Protest:

1. It is "unlawful" for the Conference to use this System "before approval" by the Board, which approval has not been given.

2. "Lawful, i.e. approved agreements only, are excepted from the Anti-Trust laws" (Quotes are from the Board's Reported Decision, September 29, 1952 in Docket 724, North Atlantic Continental Freight Conference.)

3. The Board has no authority to approve the system.

The said Statement, filed by this Conference should be disapproved by the Board, and the Conference ordered not to institute, and to cease and desist using, the proposed dual rate system, for the following further reasons;

4. The proposed exclusive patronage contract/non-contract dual rate system contravenes the provisions of the Shipping Act, 1916, and more particularly the provisions of . . .

Section 14 thereof (46 U.S.C. 812) including subdivision "Third" making it a "misdemeanor" for any "common carrier by water" to

"Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminatory or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment or for any other reason." and,

5. This Board should "disapprove" and not "approve" said proposal because it violates the provisions of Section 15 of the Shipping Act, 1916, (U.S.C. 814), in that, in addition to being "unjustly discriminatory" and "unfair as between carriers, shippers, exporters, importers" it "operates" "to the detriment of the commerce of the United States" and is "in violation of this chapter" (46 U.S.C. Chapter 23).

Isbrandtsen calls to the attention of the Board that cabled advices received by it, and dated January 16, 1953, state that this "Conference" (is) "advising" (the) "local trade", (that) "permission to institute" (the) "contract system" (has been) "obtained".

Not only do we claim the Board has no authority to approve the use of this system, but we have no knowledge that this Board has approved the use of this System by this Conference, the basic Conference Agreement (No. 3103) of which contains no language purporting to authorize the establishment of contract/non-contract rates. In the absence of such specific authority, this Board has held that approval is required *before* the system can be used. See the *Report, decided September 29, 1952, of this Board, in Docket No. 724, North Atlantic Continental Freight Conference* (pp. 9, 10) citing *U.S. Nav. Co.* v. *Cunard SS. Co.*

50 F. 2nd 83, 89. See particularly page 10 of said *Report*, where the Board, in referring to the Conference Agreement of the said North Atlantic Continental Freight Conference (which did contain the words, "the Conference may provide specific contract and non-contract rates" * *) stated that "the Conference's basic agreement * alone makes the initiation of the proposed dual rates possible".

Again the "basic (Conference) agreement" of this Japan-Atlantic and Gulf Freight Conference contains no such specific authorization "which alone makes the initiation of the proposed dual rates possible."

Respectfully submitted,

/s/ John J. O'Connor
John J. O'Connor
Attorney for Isbrandtsen Co., Inc.

Dated January 19, 1953
Washington Building
Washington 5, D. C.

BEFORE THE
FEDERAL MARITIME BOARD

IN THE MATTER OF THE
STATEMENT OF JAPAN-ATLANTIC
AND GULF FREIGHT CONFERENCE

Filed under Rule,
Section 236,
General Order 76

Comments of the Department of Justice Relating to the Information Filed, Objecting to the Approval of the Proposed Contract/Non-Contract Dual Rate System.

Now comes the Department of Justice to respectfully petition the Board to disapprove or cancel the contract/non-contract rate system agreement set forth in a Statement filed by the Japan-Atlantic and Gulf & Freight Confer-

ence with the Board on December 24, 1952, and proposed to become effective on January 23, 1953. The Department sets forth the following as grounds for this petition:

1. The reasons offered to support the use of the dual rate system are so inadequate and insubstantial as to require the Board to summarily dismiss the statement as not complying with the provisions of the rule, in that:

a. the information contained in the Statement does not meet the requirements of section 236 of General Order 76 in that inadequate information is furnished as to the necessity for or reasonableness of the use of such rates in the particular trade involved, and as support for the spread or differential between the proposed dual rates.

2. The proposed use of the dual rate system specifically requires the disapproval of the Board, pursuant to the provisions of section 15 of the Shipping Act of 1916, as amended, 46 U.S.C. 812, in that:

a. the proposed rate system would empower a specific group of water carriers to take action as to traffic matters affecting the industry as a whole, would prohibit the independent selection and use of any carrier operating in the trade by shippers utilizing such service, would be unjustly discriminatory or unfair as between carriers, shippers, exporters and importers, and otherwise operate to the detriment of the commerce of the United States, in violation of the provisions of section 15 of the Shipping Act of 1916, as amended, 46 U.S.C. 812, and the antitrust laws of the United States.

3. Immediate suspension of the effective date of the proposed dual rate system should be effected by the Board, in contemplation of its current consideration of and pending decisions in Board Dockets Nos. 724 and 725.

WHEREFORE, the Department of Justice prays that the Board suspend, and/or dismiss, disapprove, or cancel the proposed rate system.

Request for Hearing

The Department of Justice requests this Board to assign the above-entitled cause for hearing.

JAMES E. KILDAY

EDWARD P. HODGES
Acting Assistant Attorney General

WILLIAM J. HICKEY
Special Assistants to
the Attorney General

January 19, 1953.

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing comments and objections has this day been served upon all parties of record in this proceeding by mailing a copy thereof to each of said parties.

WILLIAM J. HICKEY

January 19, 1953.
Filing date: January 20, 1953.

The issues, in our opinion, are not the same, are not as confined as the Examiner has stated. It is our opinion, just stated now in this preliminary way, that the Conference, having filed certain information in compliance with General Order 76, giving the reasons for the use of the contract system in that particular trade, and the basis for the spread or differential, that they come before the Board, submit something for approval under Section 15, and that they carry the burden of proof in compliance with General Order 76, and that the issues are not necessarily those confined within the three stated by the Examiner, but that the issues also include, from our standpoint this is very important, the legality of the proposed patronage dual rate contract/non-contract system under the shipping Act of 1916, Section 14.3 and Section 15, and the other laws applicable thereto.

Mr. Hickey: I think that this matter is resolved by the statements last made to the effect that there shouldn't be any primary consideration at this time as to the burden of proof, but merely as to the initiation of the evidence by one or the other party.

Now, that logically, in my opinion, falls on the Conference. They are the one filing this proposed system, and they are the ones that have set forth their reasons why they think that it is necessary in the trade, and the spread is reasonable.

On the other hand, as far as the Administrative Procedure Act is concerned, I think that this is true. I believe that Mr. Turk has correctly stated the rule, but I don't follow his conclusion.

At this time there is no valid approval of this rate system, and I don't think anyone can contest that. Now, the Conference is seeking approval. If they are not seeking approval, I don't know why they are before the Board.

Mr. Turk: We have been brought here. You fellows are the fellows that brought us here.

Mr. Hickey: Then the Board must wish to investigate this matter, and see if it will give its approval to your proposed rate system, which is a proposal, and if it is a proposal, I think you are the proponent or seeker of the Board's approval.

Mr. Hickey: I think it is necessary to clear the record as far as Mr. Aptaker's description of the position of the intervenors, and particularly the Department of Justice is concerned.

We wish to state emphatically that we believe this system requires the prior approval of the Board, and as such they are seeking approval, and it begs the question of law to say that they are not seeking approval. We think this system is, as we suggest, illegal, per se, but if not is a Conference agreement that has to be approved, and is unlawful until approved, and I think the record should show that.

Mr. O'Connor: But look at the title of the proceeding. It is the same title as in 724. The North Atlantic filed a proposed contract system, and the Board then said we will look at it first and will not put it into effect until we look at if, and we have been looking at it since, through the Examiner, and so forth.

Now, this Conference came along and did the same thing. 724 was instituted by the Board because we filed protests, so-called. That wasn't filed exactly under General Order 76, so the exact procedure of filing comments and protests weren't approved, but we filed objections to this North Atlantic being permitted to put its system into effect, and the Board initiated Docket 724, and the Conference went ahead with their proof, whether required or not.

Now, in the hearing on General Order 76—

Examiner Furness: I think we are wasting time.

Mr. O'Connor: Wait until I finish this, if you please. I say this proceeding is the same as 724. Mr. Turk appeared in support of General Order 76, he was the only representative of any conference that supported it, as I recall, and he said in the minutes of that hearing, "The next question is the effect of a protest: I am quite confident that if a Conference comes forward here with a flabby, unsubstantial statement . . ."—which we claim this is—"as to the reason why it is putting its system into effect, and why this spread is put forward, that the Board should say this is no good, we have to examine it further, perhaps we will do what has been done in Docket 724."

So that is just what they have done here, this is an investigation by the Board, and any question of going forward, burden of proof or anything else, follows, and the fundamental theme all through it should be that this basic Conference agreement carries no authority to institute the system.

Order

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 21st of January, A. D. 1953

DOCKET NO. 730

IN THE MATTER OF THE STATEMENT OF JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE FILED UNDER GENERAL ORDER 76.

It Appearing that, pursuant to section 236.3 of General Order 76 (17 F.R. 10175, November 11, 1952), the Japan-Atlantic and Gulf Freight Conference on December 24, 1952, filed with the Federal Maritime Board a Statement alleging

that the Conference proposed the initiation in the trade between Japan, Korea, and Okinawa and United States Atlantic and Gulf ports of certain contract/non-contract rates to become effective 30 days thereafter, and alleging that said rates are in the best interests of the commerce of the United States and that the spread or differential between the rates is reasonable and lawful; and

It Further Appearing that a Notice of the filing of such Statement by the Conference was published in the Federal Register on December 31, 1952 (17 F.R. 11888) pursuant to section 236.6 of General Order 76; and

It Further Appearing that Isbrandtsen Co., Inc. filed a Protest and Comments with supporting affidavit and Amendatory and Supplemental Comments, alleging, among other things, that the Statement of the Conference does not comply with the requirements of General Order 76, and that the institution of the proposed contract/non-contract rates in said trade would cause Isbrandtsen Co., Inc. irreparable damage, and requesting a hearing on said Protest and Comments, and postponement and suspension of said contract/non-contract rates pending the Board's determination in such hearing; and

It Further Appearing that the Department of Justice also filed certain Comments objecting to the approval of the proposed rates; and

The Board having considered the foregoing Statement, Protest, Comments, and all the papers and documents relating thereto; and

It Appearing therefrom that the Statement of the Conference filed December 24, 1952 complies with the requirements of General Order 76; and

It Not Appearing from any of the above documents or other information now before the Board that the differential between said contract/non-contract rates is arbitrary, unreasonable, or unjustly discriminatory, nor that the ini-

tiation of the proposed contract/non-contract rate system will be unjustly discriminatory or unfair or detrimental to the commerce of the United States, or will be in violation of the Shipping Act, 1916, as amended, or will cause irreparable damages to Isbrandtsen Co., Inc.;

It Is Ordered, that the requests of the Department of Justice and of Isbrandtsen Co., Inc. for a suspension of the proposed contract/non-contract rates of the Japan-Atlantic and Gulf Freight Conference, in the trade between Japan, Korea, and Okinawa and United States Atlantic and Gulf ports, pending hearing and determination, be denied; and

It Is Further Ordered, that the requests of the Department of Justice and of Isbrandtsen Co., Inc. for a hearing on the said Protest and Comments be granted; and

It Is Further Ordered, that such hearing be held before an Examiner of the Federal Maritime Board at a time and place to be fixed.

By direction of the Federal Maritime Board.

A. J. Williams
Secretary

JAGFC

Minutes of Special Meeting

Toyko, 17 November 1952

CONTRACT AND NON-CONTRACT RATE SYSTEM

It was duly moved and seconded:

"That the Secretary-Manager cable the Chairman of the New York Committee of Inward Far East Lines, New York, authority to instruct Mr. Turk to file an application for the contract and non-contract system in accordance with the new rules of procedure of the Federal Maritime Board, and

which are covered in General Memorandum No. 133 of the New York Committee of Inward Far East Lines, dated 10 November."

After further discussion, the following *proposal* was moved and seconded:

RESOLVED that this Conference reinstitute contract/non-contract rates and pursuant to Federal Maritime Board general order 76 file a statement with that Board with respect to such rates and be it further RESOLVED

That the amount of the spread or differential between the contract/non-contract rates shall be nine and one-half percent of the contract rate applicable to the respective commodities or classifications to which contract and non-contract rates shall be applicable and be it further RESOLVED

That the effective date of the contract/non-contract rates shall be the thirtieth day computed according to United States eastern standard time after the date of the filing of the aforesaid statement with the Federal Maritime Board and be it further RESOLVED

That the reasons for the use of said contract/non-contract rates arise out of the following factors:

1. The long history of the Conference,

2. The stability of rates which the Conference and its predecessors have maintained for over a quarter of a century and the effect which previous contract/non-contract systems employed by the Conference and its predecessor have had in maintaining such stability.

3. The maintenance by this Conference and its predecessors for almost twenty-five years of contract/non-contract rates with respect to an ever increasing range of commodities and classifications,

4. The effect of Conference action in eliminating competition among its members relative to freight rates rules and conditions and turning the competition among the members into a contest to give merchants in Conference trade ever

improving service as indicated by progressive increase in the number of Conference members and number of sailing opportunities and constant improvement in type of vessels employed as regards speed, increased bale cubic, reefer capacity and silk rooms,

5. The practice of the non-conference competitor in quoting rates which are ten percent below the Conference rates rounded off to the nearest five cents and

6. Resulting inroads made in the Conference cargo carryings which produce in turn an ever increasing number of non-conference sailings,

7. That the result of all of the foregoing is that the reinstitution of the contract/non-contract system of rates is indispensable to avoid the necessity of adoption by the Conference Members of a policy of meeting cutrate competition with corresponding rate cuts of policy which in the past has always led to rate wars and be it further RESOLVED

That the basis of the aforesaid nine and one-half percent is that such spread is reasonable

1. Because is falls within the zone of reasonableness when tested by the standards established by the Supreme Court of the United States and has been recognized as reasonable by Japanese Government authorities, and

2. Because it is reasonable from the standpoint of the shipper since it enables him to strike a balance. The enjoyment of contract rates on all of his shipments and the employment of cut rate non-conference competition on some shipments and the payment of less than ten percent in excess of the contract rates with respect to his remaining shipments,

3. Because it is reasonable from the standpoint of the carriers in that it is expected to accomplish the objectives of the contract system as prescribed by the Supreme Court of the United States in that it will preserve the stability of freight rates as essential to the prosperity of the commerce in the foreign trade and by restoration to the carriers of some of the cargoes of which they have been deprived because of improper rate cutting increased carrying at reduced contract rates will produce more favorable revenues than lesser carryings at non-contract rates,

4. Because prior to November 15th the Conference tariff rates were substantially equivalent to the proposed non-contract rates and the Isbrandtsen rates were substantially equivalent to the proposed contract rates and large volumes of traffic moved at both said rates thus constituting an irrefutable proof not alone that both said levels of rates fall within the area of reasonableness for rates, but also that the differential between the two reasonable levels of rates fall within the area of reasonableness for the spread or differential between rates,

5. Because the exact differential of nine and one-half percent which is within the area of reasonableness was determined upon under the advice of Conference counsel here whose opinion it is that any spread in excess of said nine and one-half percent might not at this time be favorably regarded by Japanese governmental authorities and

6. Because a considerable number of Japanese shippers and representatives of shippers organizations have indicated that they consider a differential of approximately ten percent as reasonable and as being in accord with discounts of similar amount allowed in Japanese mercantile transactions and have indicated further that they favor the exact differential of nine one-half percent for the reason that the same differential is now in effect in contract/non-contract systems adopted by a number of other conferences involving important segments of Japanese foreign trade and be it further RESOLVED

That a form of freight contract be adopted as drafted by Conference counsel here modified by Conference counsel in New York to the extent deemed necessary in order to comply with the requirements of the Federal Maritime Board and be it further RESOLVED

That James A. Dennean, United States secretary of this Conference be and he is hereby authorized and directed in collaboration with the Japan-Atlantic and Gulf section of the New York Committee of the Inward Far East Lines and with Conference New York counsel to draft a statement in accordance with the requirements of Federal Maritime Board general order 76 based upon the foregoing reso-

lutions but elaborated by reference to the relevant data which has been collected in connection with the subject matter of these resolutions and that Mr. Dennean be designated the official of this Conference authorized to sign and verify said statement on behalf of the Conference and file the same with the Federal Maritime Board."

It was *UNANIMOUSLY* agreed:

"That this matter be passed on to the Chairman of the New York Committee of Inward Far East Lines immediately by the Secretary-Manager for the information of the Committee and legal counsel."

Excerpts from Oral Argument During Argument on Behalf of the Department of Agriculture

Mr. Guill, Board Member: I am a little interested in that. I notice that the foreign buyers designate their shipping lines, and I don't see why a buyer in this country cannot do the same.

I want to read Item 6. "Notwithstanding any other provision of this Agreement, if the shipper submits written proof satisfactory to the secretary of the Japan-Atlantic and Gulf Freight Conference that a foreign buyer on an F.O.B. or F.A.S. shipment from Japan has designated a non-conference vessel for shipment, then such shipment shall be exempted from this Agreement.

"The carrier shall therefore deny contract rates to such foreign buyer to destination specified under paragraph one above unless such foreign buyer shall first submit to a contract with the carrier."

The Chairman of the Board: That in effect says that the foreign buyer, in order to get the contract rates, must be a signatory to the contract. And there is no penalty against the shipper who is a signatory.

Mr. Guill: Well, then, the foreign buyer is regulated to the Conference lines. Is that correct?

The Chairman: If he wants to get the contract rates, the foreign buyer must sign.

Mr. Guill: In other words, a buyer here in the United States must sign this contract with the Conference.

Mr. Turk: No.

Mr. Cockrum: That's my construction of it likewise, Mr. Guill.

Mr. Turk: No.

Mr. Cockrum: If Mr. Turk has some other construction of it I'd be glad to hear from him.

Mr. Guill: We'll get that. But I wanted to hear your idea.

Mr. Cockrum: That is precisely my idea, that he is bound.

Excerpts from Oral Argument on Behalf of Federal Maritime Board

The Chairman: This contract is signed both by—either by shipper or by importer, is that correct?

Mr. Aptaker: Yes, sir. And finally we felt that the provision requiring all Japanese exporters to ship via conference lines, whether the shipment if C.I.F. or F.O.B., would require some clarification. The way it is constituted it conflicts with provision six of the contract, which Mr. Turk has pointed out and will undoubtedly make plain again—under Section 6, American importers are privileged to designate a non-conference line for the first shipment, but after that they must sign a contract to get the contract rates.

The Chairman: It says that the signatory to the contract gets one free bite if he acts in good faith. Thereafter, if he violates his agreement, he is subject to appeal.

Mr. Aptaker: Well, it means then, that a Japanese exporter is bound to pay the non-contract rate, even for his

own shipment, after he has once shipped on F.O.B. shipment by a non-conference line, where he had the choice of the carrier himself.

Mr. Guill: This is going to seem to be a point of the argument here, on this Section 6. Do you come to the conclusion that the buyer has to sign a contract then?

Mr. Aptaker: That's what it seems to require.

Mr. Guill: And in the event the buyer were to sign this contract here in this country, and in the case of arbitration, as you pointed out, he would have to travel over to Tokyo to work it out.

Mr. Aptaker: That's right. We felt there should be a provision for arbitration in the United States.

Mr. Guill: Do you think this is a fair contract?

Mr. Aptaker: Well, if the content of it is that shippers or exporters in Japan could say to every shipper that they are required to ship by a conference line because they are a conference signatory, and a shipper under F.O.B. has requested that they use a non-conference line, then the dual rate system could be easily gotten around.

This contract provides that F.O.B. consignees in the United States are also to be tendered these rates, and if they refuse to sign a contract—when they have a later F.O.B. shipment they have to pay the non-contract rate. If they sign it, they can control later shipments under F.O.B. terms and will be given the lower, contract rate.

The Chairman: Do you think that the end result of this contract would be that the American buyer would have to ship in a conference line?

Mr. Aptaker: Yes, he would probably have to sign a contract to get the lower, contract rate.

The Chairman: In other words, then, he wouldn't have the right to ship in an American flag, independent line?

Mr. Aptaker: That's correct, and not get the contract rate.

The Chairman: If it was C.I.F. would he get the rate, the contract rate?

Mr. Aptaker: If he got C.I.F. it would be—

The Chairman: Assuming the exporter is signatory.

Mr. Aptaker: Then it would go on the contract rate, yes, sir.

The Chairman: So he doesn't have to become a signatory in order to get the contract rate?

Mr. Aptaker: No, but if he wants to control the shipment by shipping F.O.B. he does.

The Chairman: The same thing applies to the exporter?

Mr. Aptaker: That is correct.

The Chairman: If he wants to get the contract rate he has to be signatory?

Mr. Aptaker: That's absolutely correct.

Mr. Guill: But in the event the shipper didn't comply with this—

Mr. Aptaker: He's got to absorb the difference in cost if it goes to an independent line. If he has already once controlled the shipment and has declined thereafter to sign a conference contract, when he controls the next shipment and puts it on a non-conference line, if he tries to ship that, he's going to pay the non-contract rate.

Mr. Guill: Then that does control the buyer, to which line he uses, on which line he ships.

Mr. Aptaker: To that extent, yes.

The Chairman: Again depends on the type of purchase contract, C.I.F. or F.O.B. On C.I.F. he gets the contract rate if the shipper is a contract signatory.

Mr. Guill: Now, that first point, about the buyer. If the buyer is going to have some say as to—

Mr. Turk: I am going to come to that right now, and I'd like to devote some time to that.

Mr. Klieger just called my attention to the fact that in the prewar years, when we had a contract system here, the Japanese lines didn't get all the business, and I don't think they ever will.

I'd like to have you consider with me the position of an American F.O.B. buyer. Now, you have got to consider his situation with respect to two legal rights: First, his right to ship non-conference. Second, his right to ship conference.

Now, if he's an F.O.B. buyer, then by hypothesis the goods become his as soon as they get on the ship; title passes then. And he has the right to say where they are going to go.

Now, if he's not a contract shipper and not a contract signatory, then he can ship as many shipments by Isbrandtsen or any other non-conference line as he pleases. And it's not a question of doing it once and it isn't a question of doing it twice or fifty times. He can do it without limitation.

Mr. Guill: But his buyers' market, from whom he buys, is going to be limited, isn't it?

Mr. Turk: No, I don't think so. Why should it, F.O.B.? He can say "I want to buy F.O.B." I don't know of anybody who is going to refuse to sell to him because he wants to buy F.O.B.

Mr. Guill: I understand from this contract that the seller over there can only let him have it once.

Mr. Turk: If you can show me where it says anything about once—this Clause 6 is something that I personally

drafted, and you will find that it is entirely different from the conference—in the Trans-Pacific Freight Conference of Japan. You will see that it starts out with this: "Notwithstanding any other provision of this agreement . . ." So that anything in the other paragraph is wiped out. It says, "If the shipper submits written proof that he is a foreign buyer on an F.O.B. or F.A.S. shipment to Japan, he can designate a non-conference ship."

Anytime that he comes along and says, "I'm an F.O.B. buyer from America, and here's my bill of lading. You will see that it is made out in the name of the American buyer." That means that the Japanese shipper cannot be held for breach of his freight contract with us, if it's a million times or two million times. He can ship any number of shipments by Isbrandtsen without prejudicing the seller whatsoever.

Then we say, "* * * we shall deny thereafter to the shipper the contract rates unless he signs the contract." Well, of course, he's the shipper, and if he's not a contract shipper he doesn't get the contract rates. That's on F.O.B.

But when he does, if he does, he's got an advantage over other shippers for this reason: When — as Mr. Morse pointed out this morning—when he wants to ship conference he can say to his seller, "Sell me C.I.F. I am a contract shipper, I get the benefit of the contract rates. When Isbrandtsen's in port, make out the bill of lading in my name, I want to ship on Isbrandtsen."

And he can ship it on Isbrandtsen any number of times.

Mr. Guill: I lost you there. Say I am the seller, you are the buyer.

Mr. Turk: Yes.

Mr. Guill: You tell me you want an F.O.B. shipment.

Mr. Turk: That's right.

Mr. Guill: And I have a contract with the conference.

Mr. Turk: That's right.

Mr. Guill: And I go to the conference and I say, "Look, this man wants this F.O.B. shipment. I want to send it to him this time."

Mr. Turk: On Isbrandtsen?

Mr. Guill: No, under my contract.

Mr. Turk: No, no, no. If he's an F.O.B. buyer and he's not a contract shipper, he can't get a conference vessel at contract rates.

Mr. Guill: This says that you can go to Isbrandtsen one time.

Mr. Turk: That's right.

Mr. Guill: Just one time?

Mr. Turk: No, no, any number of times.

Mr. Guill: But I can't take advantage of the contract rate any more.

Mr. Turk: You never could, since you're not a contract shipper and you are an F.O.B. buyer, which means that you are the shipper. You couldn't ship even once on a conference vessel and get a contract rate. But you can ship on Isbrandtsen's vessels any number of times, eternally, without prejudicing your sellers' contract rate.

Mr. Guill: This sellor could never ship under Isbrandtsen if he were under contract with you?

Mr. Turk: No, not if it was under a C.I.F. transaction, where he is also the shipper. He can't ship under Isbrandtsen.

Mr. Guill: Well, if the C.I.F.—in the C.I.F. the seller controls the bottom?

Mr. Turk: That's right.

Mr. Guill: And on F.O.B. the buyer controls the bottom?

Mr. Turk: That's right.

Mr. Guill: But you're limiting ten percent of this trade to the F.O.B. people. They can get ten percent.

Mr. Turk: No, no, Mr. Guill. The Japanese shippers we had over here—Mr. Tankazani, who is the chairman of the Freight Commission, Japanese Shippers' Federation, and he represents 27 shippers' organizations and two thousand separate shippers, and he testified that there will be plenty of Japanese shippers who can ship on Isbrandtsen twice a month—or, say on Isbrandtsen twice a month and once on the conference lines at non-contract rates and still come out better than the contract signers.

There is a vast field, both in the United States and in Japan for a non-conference line. And Mr. Krinkley admitted that he'd get about ten percent of the business, which is more than anybody else would get.

Excerpts from Transcript During Rebuttal Argument on Behalf of Isbrandtsen Co., Inc.

The Chairman: Well, I assume, Mr. O'Connor, you have picked up some cargo at points before you arrive at Japan.

Mr. O'Connor: Well, very little from the United States. We carry some to Japan. We carry cargo to Japan. Of course, the Japanese lines are going to get all the business.

Now, as to the F.O.B. The Japanese witnesses testified that most of the business was F.O.B. in Japan. Currency, of course, enters into that. The Japanese have testified they'd like C.I.F. And they testified very courageously they liked it because they could do a little chiseling on the rate. Maybe they didn't use that word; that's an old American right. They said they could make a little more money.

But the F.O.B. What does it come down to in this labored explanation by Mr. Turk? Somebody, I think it was the

Chairman, said that the shipper "only had one bite." Now it's the buyer that has "one bite." The FOB buyer, who traditionally, by custom, it is his right to designate the carrier. He can only do it once. Mr. Turk labored the shipper, of course, would be permitted to ship once, but that if the same buyer orders a second time from the same shipper, he's got to sign a contract to get the contract rate.

The Chairman: The same thing applies in reverse to a shipper, doesn't it? The shipper can't get the contract rates unless he signs a contract.

Mr. O'Connor: Well—

The Chairman: Isn't that true?

Mr. O'Connor: Sure.

The Chairman: Why should the buyer be in any better position?. Why should he be permitted to get the contract rates unless he signed the contract?

Mr. O'Connor: I'm saying that this is the first time, this is the first time in any conference agreement that there has been any attempt to tie up the F.O.B. buyer.

The Chairman: This doesn't tie him up. It merely says that the shipper's contract signing may not extend to the buyer the benefit of the contract rates unless the buyer also signs a conference contract if he buys F.O.B.

Mr. O'Connor: It says that you cannot patronize an independent unless you pay the conference rate.

The Chairman; No, no:

Mr. O'Connor: Well, that's what it says.

The Chairman: That is your contention.

Mr. O'Connor: That was the public counsel's contention. That's why he opposed it.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,027 January Term, 1956

Isbrandtsen Company, Inc., Petitioner,

v.

United States of America, and Federal Maritime Board, Respondents

Japan-Atlantic and Gulf Freight Conference, et al., Intervenors

The Secretary of Agriculture, Intervenor

Before Danaher, Circuit Judge, in Chambers

Order

Counsel for all parties having appeared before me for prehearing conference pursuant to Rule 38(k), and a prehearing stipulation having been prepared and presented to counsel for comment and said prehearing stipulation, as amended, now being before me for approval, it is

ORDERED that the said prehearing stipulation be approved and that the Clerk be directed to file it forthwith; that the issues in his case be limited to those presented in said prehearing stipulation; that such differences as may be noted in said stipulation as to the exact statement of the issues as submitted by the respective parties shall be deemed to encompass the area of agreement as well as disagreement as to any such issue wherein such differences shall be apparent or asserted, but no party shall be precluded from argument or reply, as the case may be, in respect to any such the Rules of this Court, such stipulation be modified by a version of an issue as stated; and that, unless pursuant to subsequent order of this Court to prevent manifest injustice, said stipulation shall control the subsequent course of the proceedings in this case.

It is FURTHER ORDERED that this order and the prehearing stipulation be printed in the joint appendix to the brief.

Dated: February 20, 1956

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed Feb. 20, 1956. Joseph W. Stewart, Clerk

No. 13,027 January Term, 1956

Isbrandtsen Company, Inc., Petitioner,

v.

United States of America and Federal Maritime Board, Respondents,

Japan-Atlantic and Gulf Freight Conference, et al., Intervenors,

The Secretary of Agriculture, Intervenor.

Prehearing Stipulation

Counsel for all the parties to this case having appeared before Circuit Judge Danaher for a Prehearing Conference pursuant to Rule 38(k), and it appearing that there is a serious controversy among the parties as to the exact scope of some of the issues to be presented, and counsel for petitioner, counsel for respondent Federal Maritime Board and counsel for intervenor Japan-Atlantic and Gulf Freight Conference having each submitted statements of the issues, and counsel for respondent the United States having orally stated that he will participate on the side of the petitioner and accept its statement of the issues, and counsel for intervenor The Secretary of Agriculture having orally stated that he will participate only to the extent of presenting argument on the side of petitioner on petitioner's Issue

No. 1, it is hereby stipulated that the claims and contentions of the parties with regard to the issues are as follows, viz:

(1) Petitioner claims the first issue presented is, as follows:

Whether the employment of the so-called exclusive patronage contract/non-contract dual rate system under which common-carrier members of a steamship conference acting in concert, charge one set of rates to shippers who agree to ship all their cargo exclusively on the vessels of the conference lines, and charge a higher set of rates for identical transportation services to shippers who do not enter into such exclusive patronage contracts is unlawful under, or in violation of sections 14, 15, 16, and/or 17 of the Shipping Act, 1916, so that the Federal Maritime Board under section 15 of said Act, lacks authority to approve an agreement, understanding or arrangement entered into by the members of such a conference for the use of such a system?

and counsel for the other parties agree as to petitioner's statement of issue No. 1.

(2) Petitioner contends that a further issue exists, i.e.:

Whether such a system violates the various provisions of the Anti-Trust laws or any other pertinent statutes, including the question whether the system could ever be legally approved under section 15 of the Shipping Act, because that section can exempt from the Anti-Trust laws only agreements between carriers and "other persons" subject to the Act, whereas the fundamental part of this system is a so-called exclusive patronage contract between conference lines and shippers, who are neither carriers nor "other persons" subject to the Act.

and respondent Federal Maritime Board and intervenor Conference, although not agreeing that the foregoing is an issue in this case, concede that they may argue the matter set forth above, but contend that the issue raised in petitioner's Paragraph 2 should read, as follows:

Whether such a system violates the various provisions of the Anti-Trust laws or any other pertinent statutes, in-

cluding the question whether the system could ever be legally approved under section 15 of the Shipping Act?

(3) Petitioner claims that a third issue should be stated as follows:

Whether the Board could, in any event, approve the use of the exclusive-patronage-contract-dual-rate system in the particular trade herein involved on the basis of the facts existing in the administrative record as found by the Board itself and the Board's examiner?

and the respondent and intervenor Conference claim that petitioner's Issue No. 3 should read, as follows:

Whether the Board could, in any event, approve the use of exclusive-patronage-contract-dual-rate system in the particular trade herein involved on the basis of the facts existing in the administrative record as found by the Board?

(4) Petitioner claims a fourth issue should read as follows:

Whether the Board, in approving such a system under section 15 of the Shipping Act even assuming the legality of such a system, must have before it a clearly stated "agreement" or "understanding" between the common carriers involved, including the actual rates which would be charged by such conference carriers pursuant to their concerted action?

and respondent and intervenor Conference object thereto on the ground that no specific agreement has been challenged in petitioner's statement of the issue, and claim that Issue No. 4 should read, as follows:

Whether the Board erred in determining that the statement filed by Japan-Atlantic and Gulf Freight Conference under the Board's General Order 76, constituted a memorandum of an agreement, or of a modification of an agreement, which might be approved under the provisions of section 15 of the Shipping Act, 1916?

(5) Petitioner states issue No. 5 to be as follows:

If section 15 of the Shipping Act, 1916, should authorize the Board to approve such a system, whether such section of the Act would thereby be rendered unconstitutional under the "Due Process" clause or other provisions of the Constitution by reason of the fact that it would give the Board and/or Conference the power to force the independent carrier or carriers either out of the trade or into the conference and/or permanently prevent independent competition from entering the trade by making non-conference competition economically impossible?

and respondent and intervenor Conference contend issue No. 5 should be, as follows:

If section 15 of the Shipping Act, 1916, should authorize the Board to approve such a system, whether such section of the Act should thereby be rendered unconstitutional under the "Due Process" clause or other provisions of the Constitution?

It is further stipulated that petitioner and respondent the United States of America and intervenor the Secretary of Agriculture shall designate the portions of the record which they wish printed in the Joint Appendix by February 23, 1956, and respondent Federal Maritime Board and intervenor Conference shall designate the portions of the record which they wish printed by March 5, 1956, after which the Joint Appendix shall be printed as promptly as possible. Petitioner shall file its brief by March 22, 1956. If the Joint Appendix is not prepared by that date, petitioner may file a single typewritten copy of his brief without page references to the Joint Appendix, to be followed by a printed brief with page references to the Joint Appendix as soon as possible. The briefs of respondent, United States of America, and of intervenor, Secretary of Agriculture, shall be filed in the time provided for filing petitioner's briefs. Respondent's brief and brief of intervenor, Japan-Atlantic and Gulf Freight Conference, shall be filed by April 17, 1956. If the Joint Appendix has not been prepared by that date typewritten briefs may be filed without page refer-

ences to the Joint Appendix, to be followed by printed briefs with page references to the Joint Appendix as soon as possible. Petitioner's reply brief shall be filed in printed form by May 2, 1956, and all other briefs in printed form shall be filed by that date and the case set for hearing thereafter as soon as the business of this Court will permit.

Approved: (s)Danaher,
Circuit Judge

Dated: February 20, 1956

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

January Term, 1956

No. 13,027

ISBRANDTSEN COMPANY, INC., *Petitioner,*

v.

UNITED STATES OF AMERICA, AND FEDERAL MARITIME BOARD, *Respondents,*
JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE,
SECRETARY OF AGRICULTURE, *Intervenors.*

Before: Danaher, Circuit Judge, in Chambers.

Order

Upon consideration of the letters of counsel regarding the preparation of the appendix in the above case, it is

ORDERED that the prehearing stipulation entered herein February 20, 1956, be, and it is hereby, amended by striking from the petitioner's issue No. 3, the words "and the Board's examiner."

It is FURTHER ORDERED that the time for filing briefs and the joint appendix be, and it is hefeby, extended as follows:

Petitioner shall file a single typewritten copy of its brief by March 29, 1956, without page references to

the joint appendix, to be followed by a printed brief with page references to the joint appendix as soon as possible.

The briefs of respondent, United States of America, and of intervenor, Secretary of Agriculture, shall be filed at the same time and in the same manner as petitioner's briefs.

The brief of respondent, Federal Maritime Board, and the brief of intervenor, Japan-Atlantic and Gulf Freight Conference, shall be filed by April 24, 1956.

If the joint appendix is not filed by that date, each of said parties may file a single typewritten brief without page references to the joint appendix, to be followed by printed briefs as soon as possible. Petitioner's reply brief shall be filed in printed form by May 9, 1956, and the case set for hearing thereafter as soon as the business of this Court will permit.

Dated: March 16, 1956

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In the Supreme Court of the United States

OCTOBER TERM, 1956

FEDERAL MARITIME BOARD, PETITIONER

v.

ISBRANDTSEN COMPANY, INC.,

UNITED STATES OF AMERICA,

AND

SECRETARY OF AGRICULTURE, RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Edward S. Rogers

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Platt v. *LeCoeq*, 150 F. 391 (C. C. D. S. D. 1906) 27

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Miscellaneous:

H. R. Doc. 805, 63d Cong. (1914), 4 vols., Alexander Report 11, 20–27

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. ———

FEDERAL MARITIME BOARD, PETITIONER

v.

ISBRANDTSEN COMPANY, INC.,

UNITED STATES OF AMERICA,

AND

SECRETARY OF AGRICULTURE, RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Federal Maritime Board respectfully prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the District of Columbia Circuit, filed November 9, 1956, setting aside certain orders of the Board.[1]

OPINION BELOW

The opinion of the Circuit Court of Appeals, which has not as yet been reported, is attached as Appendix A.

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[1] A certified copy of the record in the Court below has been filed with the Clerk of this Court.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 9, 1956 (R. 251). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1) (62 Stat. 928), as prescribed by 5 U. S. C. Section 1040 (Section 10, 64 Stat. 1132).

QUESTION PRESENTED

Whether a system of ocean steamship rates of the kind commonly known as a "dual rate system" is *per se* illegal under section 14, Third, Shipping Act, 1916, with the result that the Board may not under section 15 of that Act approve an agreement to use such a system.

STATUTES INVOLVED

The pertinent provisions of the Shipping Act, 1916, as amended, 46 U. S. C. 801 *et seq.*, are set forth in Appendix B.

STATEMENT OF THE CASE

The Japan-Atlantic and Gulf Freight Conference (the "Conference") is a voluntary association of common carriers by water serving the inbound trade from Japan to ports on the United States Atlantic and Gulf coasts. The Conference exists by virtue of its organic agreement, approved by the Board[2] under section 15, Shipping Act, 1916.

[2] "Board", as used in this Petition, refers to the Federal Maritime Board and its predecessor agencies. The United States Shipping Board was created by the Shipping Act, 1916 (46 U. S. C. 804, 39 Stat. 728), and was succeeded by the Secretary of Commerce by Executive Order 6166, June 10, 1933, by the United States Maritime Commission by the Merchant Marine Act, 1936, section 204 (a) (46 U. S. C. 1114, 49 Stat. 1987) and by the Federal Maritime Board by Reorganization Plan No. 21, section 104 (15 F. R. 3178).

Section 15 (46 U. S. C. section 814, Appendix B, pp. 44–48) authorizes the Board to approve agreements among common carriers by water or other persons subject to the Act. Among the enumerated agreements are those fixing rates or giving special rates. Agreements subject to section 15 are exempt from the antitrust laws. The section authorizes the Board to disapprove any agreement that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of the Shipping Act, 1916, and directs it to approve all others.

On December 24, 1952, the Conference filed a statement with the Board announcing their proposal to initiate a system of rates of the type commonly known in ocean transportation as a "dual rate system". The Conference's proposal resulted from conditions in the trade, discussed below, which subsequently were found by the Board to justify the use of the system.

Under the proposed dual rate system, contract rates on virtually all commodities would be given to those shippers promising to ship exclusively via Conference vessels, and all other shippers would be charged a regular conference tariff rate 9½ percent higher than the contract rate. The shipper's promise is embodied in a "Shipper's Rate Agreement" (R. 203–206) which, among other things, provides for liquidated damages to be assessed against contracting

shippers who violate the agreement by shipping via a non-Conference line. Thus, the dual rate system contemplates two levels of rates, separated by a fixed differential, the lower of which is made available to shippers who agree exclusively to patronize the Conference members.

After receiving protests against the Conference proposal by Isbrandtsen Company, Inc. (Isbrandtsen), on January 12 and January 19, 1953 (R. 207-209), and by the Department of Justice (R. 209–211), the Board, on January 24, 1953, ordered a hearing on the protests. The Department of Agriculture intervened in the proceeding.

A complete record was taken before a hearing examiner of the Board. Exceptions to the Examiner's recommended decision and replies thereto were filed, and oral argument was heard by the Board. The Board issued its Report on December 14, 1955 (R. 19–69), and on December 21, 1955, and January 11, 1956, the Board issued orders approving the Conference agreement adopting the dual rate system (R. 73–74).[1]

By stipulation of the parties, the findings of fact made by the Board in its Report of December 14, 1955, are to be taken as true for purposes of Court review (R. 230–235). These findings, leading to the Board's approval of the Conference proposal, may be summarized as follows:

The Conference is a voluntary association of seventeen steamship lines. The present Conference mem-

[1] The January 11 order clarified the December 21 order.

bership includes five United States-flag lines, eight Japanese-flag lines, and four lines of other foreign nationalities (R. 23).

Since World War II, Isbrandtsen has furnished the only non-conference berth (or common carrier) service in the trade. From 1947 to early 1949, Isbrandtsen operated from Japan to U. S. Atlantic ports via the Suez Canal. Since early 1949, it has operated an approximately fortnightly service from Japan to U. S. Atlantic ports via the Panama Canal as part of its eastbound, round-the-world service (R. 25).

Conference membership is open to any common carrier regularly operating or intending so to operate in the trade. Isbrandtsen has remained outside the Conference as a matter of choice, although invited to join (R. 25).

The trade is overtonnaged; that is, there is a considerable excess of vessel space over cargo offerings. Total sailings have risen sharply postwar (R. 27). American flag lines, including Isbrandtsen, but excluding American President Lines and Lykes,[1] carried 53 percent of the total berth cargo in the trade in 1950, 46 percent in 1951, 34 percent in 1952, and 21 percent in the first six months of 1953. The Japanese lines, which began to reenter the trade in 1951, have carried an increasing share of the traffic (R. 27–28). The vessels of the Conference, and, to a lesser

[1] Lykes Bros. S. S. Co. serves U. S. Gulf ports only; American President Lines operates from Japan to Atlantic ports of the United States via the Suez Canal as a part of its westbound, round-the-world service. Neither line's carryings are materially important in the Conference trade.

extent, Isbrandtsen, had substantial free space after completion of loading in Japan (R. 28).

Between 1947 and March 12, 1953, Isbrandtsen maintained its rates on most commodities, on the average, at a level approximately 10 percent below the corresponding Conference tariff rates. Conference increases in rates were followed promptly by Isbrandtsen increases, and when, in November 1952, the Conference announced a 10 percent reduction in rates, Isbrandtsen announced that its new rates would be 10 percent less than the effective Conference rates (R. 29). Because Isbrandtsen uniformly followed Conference rate increases with corresponding increases in its own rates, its participation in the trade, prior to the outbreak of the rate war, had little practical effect in keeping rates down (R. 68).

The Conference is at a competitive disadvantage as compared with individual lines in making rapid rate changes, because changes in Conference rates may only be made by an affirmative vote of two-thirds of the voting members (R. 30).

The statistical tables in the Board's Report reveal the effectiveness of Isbrandtsen's rate cutting tactics. In 1950, 1951, and 1952, respectively, Isbrandtsen made only 13 percent, 11 percent, and 10 percent of the sailings, but carried 34 percent, 30 percent, and 26 percent of all the cargo moving in the trade (R. 27). Indications that Isbrandtsen, prior to the opening of rates,[5] had planned to increase its service to

[5] By opening rates, Conference members discontinue the collective fixing of rates. Each member becomes free to fix its own rates independently of the other members.

three or four sailings per month leads to the conclusion that under closed single rates, Isbrandtsen's participation would have been further increased, most probably at the expense of non-Japanese Conference lines which do not enjoy as an offsetting factor the nationalistic preference of Japanese shippers (R. 61).

At a special meeting on March 12, 1953, the Conference voted to open rates on ten of the major commodities moving in the trade in order to meet Isbrandtsen's competition. Subsequently, the Conference voted to open rates on most of the commodities that move in substantial volume in the trade (R. 30). After March 12, 1953, the level of rates dropped, first, to about 80 percent, and later to about 30 percent to 40 percent of the pre-March 12 level. On a fairly large number of items, some lines have charged rates as low as $6.00–$6.50 per ton, while the mere cost of loading and discharging the cargo in this trade is approximately $8.50 per ton. Isbrandtsen tried at first to keep on a competitive basis in the rate war until mid-May 1953, when it set minimum rates. Since the rate war, Isbrandtsen has carried little cargo in the trade (R. 31).

Many Japanese shippers have requested the Conference to close rates and to end the rate war. The resultant instability has adversely affected the smooth flow of commerce between Japan and the United States; has raised a threat that customs duties in the United States might be increased; has affected the

value of inventories of Japanese goods in the United States; and has caused requests for postponement of shipment by f. o. b.[6] buyers in the United States, since such buyers assume the risk of fluctuating freight rates. Resale prices of Japanese goods are often fixed by the importers as much as six months in advance of their arrival in the United States (R. 32).

Each of the shippers testifying before the Board in this proceeding gave his general support to the use of dual rates as proposed by the Conference (R. 33).

In the light of these facts, the Board considered inauguration of a dual rate system to be necessary to enable the Conference to meet its non-conference competition (R. 60), and found that institution of the system will result in greater stability of rates and service, facilitate forward trading, and decrease the threat of rate wars (R. 61–62). The Board further found that the 9½ percent spread was reasonable and would probably allow Isbrandtsen to retain 10 percent or more of the cargo moving in the trade (R. 62).

Isbrandtsen petitioned the Court below to review the Board's Orders and applied for an interlocutory injunction pending such review. On February 10, 1956, an interlocutory injunction was granted, and after consideration of the merits, the Court below issued its decision of November 9, 1956, which the Board now asks the Supreme Court to review.

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[6] Most commodities in this trade are sold on a f. o. b. basis (R. 32).

REASONS FOR GRANTING THE WRIT

SUMMARY OF REASONS

The decision below should be reviewed by this Court because: (1) It declares unlawful the "dual rate" system now in use by scores of conferences, including virtually every steamship line in the foreign trade of the United States, and would have a disastrous impact on the higher-cost American-flag carriers, as well as a profoundly unsettling effect upon nearly all shippers and consignees in the foreign commerce of the United States. (2) The decision undoes decades of administrative and regulatory practice under the Shipping Act, 1916, and cannot be reconciled with decisions of this Court including *Swayne & Hoyt v. United States*, 300 U. S. 297, 304 (1937), which stated that the use of the dual rate system in any particular trade is to be judged on the basis of "whether its effect was to exclude other carriers from the traffic, and if so, whether * * * it operated to secure stability of rates with consequent stability of service, and, so far as either effect was found to ensue, to weigh the disadvantages of the former against the advantages of the latter." (3) The Court below reached its result by an unprecedented and erroneous construction of Section 14, Third, of the Act.

E. THE PUBLIC IMPORTANCE OF THE ISSUE

The decision below condemns, as illegal *per se*, the dual rate system, and would prohibit its use in the foreign commerce of the United States. It would strip from the carriers engaged in this commerce, and

from their shippers and consignees, their only available safeguard against destructive competitive practices.

Competitive relationships between ocean carriers in foreign commerce are extremely precarious. They are subject to dynamic influences which are absent in the case of domestic transportation. In the first place, ships of different nationalities operate under widely varying cost factors. Ships of United States registry, for example, have the most demanding manning scales in the world, and have wage rates far in excess of those of any other nation; even among the various foreign nationalities, the cost of ship operation varies over a wide range. Similar variations obtain in capital costs. Secondly, the freedom of the seas permits carriers to enter service whenever and wherever they choose—a freedom not available to domestic carriers. Thirdly, the level of rates is not subject to control by any government. The volatility of rates is therefore free of those inhibiting powers granted by statute to regulatory agencies interested in domestic transportation. Finally, the cost of carrying additional lots of cargo on board a ship already committed to sail is very small. This "added cost" feature makes it possible for carriers to obtain substantial profits even at relatively low rates if, as a result of a special competitive advantage, as here, it is able to fill its ships. This furnishes a strong incentive toward cutthroat competition.

These basic facts of ocean transport have led to the evolution of carrier practices aimed at preventing the outbreak of chaotic rate wars. In almost every major

trade in the world, the carriers serving such trades have joined in conferences, for the purpose of establishing scales of rates common to all the carriers. So long as all of the carriers in a trade adhere to the conference tariff, stability of rates and service may be achieved. If, however, a competing carrier cuts rates and is able thereby to divert substantial quantities of traffic from the other lines, an almost irresistible impetus toward a rate war is created.[7]

The existence of a conference in a trade is therefore not always enough, by itself, to maintain stability of rates and service. In worldwide trades which

[7] The Alexander Committee, whose extensive investigation of the shipping industry and four volume report, H. R. Doc. 805, 63d Cong., 1914 (hereinafter the Alexander Report), were the basis for the Shipping Act, 1916, recognized these considerations, and the Act was patterned with them in mind. The recommendations in the Alexander Report contain the following statement (4 Alexander Report, 416):

"These advantages, the Committee believes, can be secured only by permitting the several lines in any given trade to cooperate through some form of rate and pooling arrangement under Government supervision and control. It is the view of the Committee that open competition cannot be assured for any length of time by ordering existing agreements terminated. The entire history of steamship agreements shows that in ocean commerce there is no happy medium between war and peace when several lines engage in the same trade. Most of the numerous agreements and conference arrangements discussed in the foregoing report were the outcome of rate wars, and represent a truce between the contending lines. To terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership. Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement."

do not include the foreign commerce of the United States, the deferred rebate system,[3] as well as other competitive devices, have been widely employed. Certain of these competitive practices were expressly condemned by the Alexander Committee, and prohibitions against their use were enacted in the Shipping Act, 1916. Thus, deferred rebates (section 14, First), fighting ships (section 14, Second), retaliation by refusal of service (section 14, Third), and unfair contracts based on volume of freight offered (section 14, Fourth), are unlawful in trades to and from the United States.

But the dual rate system has long been considered to be available to carriers under the Shipping Act, 1916, as a defensive device to meet the competitive problems inherent in ocean shipping. Virtually every major American-flag line in the essential trades in the foreign commerce of the United States is a member of one or more of the 62 conferences presently employing dual rates as a method of maintaining stability of rates and service.[4]

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[3] A deferred rebate system is one in which shippers promise to patronize the Conference members exclusively for a period of time, typically a year, in return for which they are given a rebate, usually fixed in terms of a certain percentage of the tariff rates. The rebate is payable at some time after expiration of the contract period, for example, six months after the contract year has ended. A shipper who patronizes a non-conference line during the contract period or during the following six months, or who fails to renew his contract at the end of the period, forfeits the rebates accrued to his credit.

[4] These figures have been taken from the records of the Board's Office of Regulation, which maintains current information on the activities and status of all section 15 agreements.

In addition, two pending applications to institute the system

The decision of the Court below directly and critically affects each one of these trades. It would require abandonment of the system by every conference now using it, and it would make the system unavailable to all other conferences as a defensive device should the incursions of rate-cutting competition become intolerable. Not alone are carriers affected, but also shippers, for it alters with a single stroke commitments governing the movement of huge quantities of traffic and would deprive the shippers of the stability they seek in entering into the shipper's rate agreements. By reason of its broad implications, this litigation has been given considerable attention by executive departments of the Government. The Department of Justice, the Department of Agriculture, and the Federal Maritime Board each appeared in the proceedings below.

Moreover, the decision below may operate to impose very substantial liabilities upon members of conferences currently using dual rates. As noted above, more than half of the conferences now employ the system, and it has been contended that, should the decision below stand, their employment of the system will have been in violation of the Shipping Act, 1916. Not only is it contended that civil liabilities in the form of reparations are possible, but also criminal

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are the subject of litigation, one before the Board in F. M. B. Docket No. 795, and the other before the U. S. Court of Appeals for the District of Columbia in *Ezra Taft Benson* v. *United States and Federal Maritime Board, et al.*

liabilities, which, for violations of section 14, Third, may amount to a fine of not more than $25,000 for each offense.

2. THE DECISION BELOW OVERTURNS A GENERATION OF PRACTICE AND DECISION.

The Board and its predecessors have long believed that they have power to approve the dual rate system and have for many years acted upon that belief. The contention that the system is illegal *per se* has frequently been addressed to the Courts but has never before prevailed. The Court below explicitly recognized at p. 9 that "the dual rate system has not been held by any judicial decision to be invalid under section 14, Third; that is, without regard to the reasonableness or justness of the discrimination inherent in the system." (R. 244–245.)

In *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474 (1932), the dual rate system was assailed in this Court as illegal *per se*, and the issue accordingly inappropriate for application of the doctrine of primary jurisdiction. This Court rejected the argument, and stated, at p. 487, that:

> Moreover, having regard to the peculiar nature of ocean traffic, it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications.

Thereafter, in *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297 (1937), this Court sustained an order of the Board prohibiting the use of dual rates in

the domestic intercoastal trades. Although the three-judge District Court below, which had also sustained the Secretary's order, *had ruled, in effect, that the system was illegal per se, the Supreme Court declined to go so far*, pointing out at p. 304 that:

> * * * Whether a discrimination in rates or services of a carrier is undue or unreasonable has always been regarded as peculiarly a question committed to the judgement of the administrative body, based upon an appreciation of all the facts and circumstances affecting the traffic. [Citations omitted.]
>
> In determining whether the present discrimination was undue or unreasonable the Secretary was called upon to ascertain whether its effect was to exclude other carriers from the traffic, and if so, whether, as appellants urge, it operated to secure stability of rates with consequent stability of service, and, so far as either effect was found to ensue, to weigh the disadvantages of the former against the advantages of the latter. * * *

The Court further stated (p. 307, n. 3) that the Alexander Committee was fully informed of the contract rate system and expressly recognized the propriety of its use while condemning other systems. The Court therefore acknowledged that the dual rate system may be authorized under the Shipping Act where justified by the circumstances:

> The report of the House Committee on the Merchant Marine & Fisheries, H. R. Doc. 805, 63d Cong., 2d Sess. (1914), recommended (p. 307) the prohibition of deferred rebates, adopted in § 14 of the Shipping Act, because it

operated to tie shippers to a group of lines for successive periods, and because the system "is unnecessary to secure excellence and regularity of service, a considerable number of conferences being operated today without this feature." See, e. g., pp. 103–105, 200. The Committee recognized that the exclusive contract system does not necessarily tie up the shipper as completely as "deferred rebates," since it does not place him in "continual dependence" on the carrier by forcing his exclusive patronage for one contract period under threats of forfeit of differentials accumulated during a previous contract period. Accordingly the Committee did not condemn the contract system completely. Cf. *W. T. Rawleigh Co.* v. *Stoomvaart*, 1 U. S. S. B. 285. The policy of the statute may properly be applied where, as in the circumstances of this case, the contract system must be taken as actually operating to effect a monopoly. Cf. *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, 1 U. S. S. B. 41.

Next, in *Isbrandtsen Co., Inc.* v. *United States*, 81 F. Supp. 544 (S. D. N. Y. 1948), appeal dismissed *sub. nom. A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Co., Inc.*, 336 U. S. 941 (1949), the three-judge District Court enjoined a conference from instituting a dual rate system, conditioning its injunction on Isbrandtsen's diligent prosecution before the Board of a complaint challenging the lawfulness of the system. The District Court stated, with respect to a contention of Isbrandtsen that dual rates were necessarily illegal (at p. 546):

> It may be that the "exclusive patronage" provisions are prohibited by 46 U. S. C. A. § 812 [Section 14, Shipping Act] and that the Commission is powerless to approve such provisions under 46 U. S. C. A. § 814. *Very considerable doubt upon such a holding is thrown by Swayne & Hoyt, Ltd. v. U. S.*, 1937, 300 U. S. 297, 306, 307 and note 3, 57 S. Ct. 478, 81 L. Ed. 659, *and by the legislative history of the Statute*, H. R. Doc. No. 805, 63d Cong., 2d Sess., 1914, 287–292.[10]

The subsequent court decisions on the subject of dual rates have held that the differential or "spread" between contract and non-contract rates must not be arbitrarily fixed, *Isbrandtsen Co., Inc.* v. *United States*, 96 F. Supp. 883 (S. D. N. Y. 1951), aff'd by an equally divided Supreme Court *sub. nom. A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Co.*, 342 U. S. 950 (1952); that under the doctrine of primary jurisdiction, the Attorney General must first resort to the Board in bringing a complaint against a conference using dual rates, *Far East Conference* v. *United States*, 342 U. S. 570 (1952);[11] and that the institution of a dual rate system amounted to a new or modified agreement between the carriers, requiring prior Board approval under section 15 as a condition to legality, *Isbrandtsen* v. *United States*, 93 App. D. C. 293, 211 F. 2d 51 (D. C. Cir. 1954), cert. den. 347 U. S. 990;

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[10] Emphasis added throughout unless otherwise noted.

[11] Here, Justices Douglas and Black dissented on the ground that the system is *per se* unlawful and could not, therefore, be approved by the Board. The majority refused to decide the case on that ground.

River Plate and Brazil Conferences, et al. v. *Pressed Steel Car Co.*, 124 F. Supp. 88 (S. D. N. Y., 1954).

Throughout the period covered by these decisions, the dual rate system was in extensive use. It seems plain that if the system were illegal *per se*, as was urged in each of the above cases, the outcome would long since have been outright condemnation of the system. Rather, the governing judicial pronouncement is that in *Swayne & Hoyt, supra*, which held not that the system is unlawful *per se*, but that it was for the Board to decide whether the system is reasonable or unreasonable. Guided by this doctrine, the Board has permitted the use of dual rates in those trades where their use has been shown to be reasonable and justified, and has condemned their use where not reasonable and justified.[12]

3. THE DECISION MISCONSTRUES SECTION 14 OF THE SHIPPING ACT, 1916

The Court below did not disagree with the Board's finding of urgent need for a competitive safeguard such as the dual rate system, but it construed section 14, Third,[13] as an "insuperable barrier" to approval of

[12] Dual rate systems have most recently been approved by the Board in the instant case and in F. M. B. Docket No. 725/751, covering the trade from U. S. North Atlantic ports to ports in Belgium, Holland, and the North Sea coast of Germany, and disapproved in F. M. B. Docket No. 743, covering the trade from ports in Japan, Korea, and Okinawa to ports on the Pacific Coast of North America.

[13] This section provides that no common carrier by water shall

"Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason."

the system no matter how desperate the competitive situation might be. On p. 7 of its opinion (R. 242), the Court states:

> We might agree with the Board that the objectives it seeks in approving the dual rate system are consistent with the objectives of the statute; but these can be furthered only by means permitted by the statute. It is here [in section 14, Third] that we find an insuperable barrier.

And on p. 8 (R. 243), the Court states:

> True it is, as the Board urges with much persuasion, the dual-rate system may be very potent in promoting stability and regularity of service and may be warranted by competitive considerations; but when at the same time the system constitutes retaliation and is also discriminatory it runs into the barrier of section 14, Third, however desirable it might otherwise be.

In nullifying the Board's approval of the system, the Court below erred in failing to construe section 14 as a whole, and it erred in failing to read the words "retaliate" and "discriminating" in the sense in which they were used in the Act.

A. The Decision Below Strips All Meaning From Section 14, First

Section 14, First, provides that:

> * * * no common carrier by water shall * * *
>
> First. Pay, or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow, a deferred rebate to any shipper. The term "deferred rebate" in this Act means a return of any portion of

> the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

By its broad construction of section 14, Third, the Court has in effect written section 14, First, out of the Act. In the first place, it is obvious that if section 14, Third, outlaws the dual rate system, it must *a fortiori* outlaw the deferred rebate, for the latter is far more forceful and retaliatory a device than the former. Secondly, Congress took great pains to define in exact terms the "deferred rebate" outlawed by section 14, First, and thus, in effect, to distingush it from other forms of discount. Under the construction of the Court below, the deferred rebate, the ordinary rebate, and any other system of discount would all be prohibited, thus making the careful statutory definition in section 14, First, a nullity.

B. The Construction of the Court Below Fails To Distinguish Between Conference Actions Expressly Condemned and Those Impliedly Approved

In its "Summary of Conferences and Agreements," the Alexander Report (4 Alexander Report 287–293) describes certain practices then used by conferences for the purpose of "Meeting the competition of lines

outside the conference."[14] The first two practices described were deferred rebates and fighting ships. These were strongly condemned. The third practice described was (4 Alexander Report 290):

> 3. *Contracts with shippers which may be classified as:*
>
> (a) *Joint contracts made by the conference as a whole.* Such contracts are made for the account of all the lines in the agreement, each carrying its proportion of the contract freight as tendered from time to time. The contracting lines agree to furnish steamers at regular intervals and the *shipper agrees to confine all shipments to conference steamers,* and to announce the quantity of cargo to be shipped in ample time to allow for the proper supply of tonnage. *The rates on such contracts are less than those specified in the regular tariff, but the lines generally pursue a policy of giving the small shipper the same contract rates as the large shippers, i. e., are willing at all times to contract with all shippers on the same terms.*

Here is clear recognition and implied approval of a rate practice different in no essential feature from the dual rate system approved by the Board in the instant case.

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[14] The Alexander Committee condemned only "*certain*" and not *all* of the practices of conferences in "meeting the competition of lines outside the conference." See 4 Alexander Report 417, where the Committee expresses its concern with "the unfairness of *certain* methods—such as fighting ships, deferred rebates, and threats to refuse shipping accommodations—used by some conference lines to meet the competition of nonconference lines."

Subsequently, Congress carried over into section 14 an exact definition of "deferred rebate" and "fighting ship" as condemned by the Committee and made their use a crime. Were it intended, Congress would similarly have described and condemned the dual rate system. But the dual rate system was not so prohibited, nor was any such prohibition intended, even inplicitly, in section 14, Third.[15]

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[15] This conclusion is compelled by an analysis of the Committee's discussion of the methods used by conferences in meeting non-conference competition.

In describing deferred rebates, the Alexander Report, at Vol. 4, p. 287, states:

"Since the time of payment of the rebate follows the period for which it is computed, the shipper, if he desires to obtain the rebate, *is under constant obligations to the conference lines*, and is prevented from patronizing any other service since that act would mean the forfeiture of all accumulated rebates."

The Report, at Vol. 4, p. 307, points out "*That deferred rebate systems are objectionable and should be prohibited for the following reasons:*

"(1) By deferring the payment of the rebate until three or six months following the period to which the rebate applies ship owners effectively tie the merchants to a group of lines for successive periods. *In this connection it is argued that the ordinary contract system does not place the shipper in the position of continual dependence that results from the deferred rebate system.*"

The feature of the deferred rebate system which outraged the Committee was its placing of shippers in *continual dependence*. Section 14, First, was so phrased as to make absolute the prohibition against this feature. *It is most significant that the Committee here took pains to distinguish this condemned system from the "ordinary contract system,"* which "does not place the shippers in the position of continual dependence." See, *Swayne & Hoyt* v. *U. S.*, 300 U. S. 297, 307, n. 3 (1937). It should be noted that the shipper contract here presented permits the shipper to withdraw on three months' notice.

The Court below, at pp. 13–14 (R. 248–249), seeks to distinguish between the contracts known to and impliedly approved by the Alexander Committee and those before the Court. The decision states that in the 1913 contracts, "The sellers (carriers) undertook a firm obligation to provide space; both parties undertook firm obligations as to the price." Neither ground for distinction can survive analysis.

As to the price provisions, the Court's footnote 3 on p. 14 (R. 249) informs us that "In most of these [1913] contracts the price term was fixed as against increases, but shippers were entitled to any decreases in the regular tariffs." The contracts in the instant case provide that "Increases shall not become effective until the expiration of the calendar month during which notice is given and of the two calendar months next following * * *. Should the Carriers during the period of this Agreement reduce rates on any commodity on which Contract rates are applicable, the Shipper shall be given the full benefit of such reduced rates * * *" (R. 203). Thus, the price provisions in the 1913 contracts and current contracts differ only as to the period (two to three months, as compared to six months)[16] during which the price guarantees are to last.

As to the space commitments in the old and new contracts, the Court's distinction is inconsequential. The 1913 contracts were not, as shown by the testi-

[16] The Court below on p. 14 (R. 249) states that in the 1913 contracts "* * * the price was fixed for the term of the contract (usually 6 months) * * *."

mony before the Alexander Committee, primarily meant to furnish space guarantees. See, for example, testimony at 1 Alexander Report 96. Of more importance, however, is the fact that the dual rate system is a defensive weapon which may be instituted with Board approval only in trades where a rate-cutting nonconference line makes serious inroads upon the conference carryings, i. e., leaves the conference members with substantial unused space.[17] In such a situation, the last thing the shipper needs is a guarantee of space from the conference.

Far more important than their minor differences is the inherent similarity between the major features of the 1913 contracts and the ones involved here. Both provide for exclusive patronage; both call for the use of a dual schedule of rates.

C. The Construction of the Court Below Is Inconsistent With the Intended Meaning of Retaliation as Evidenced by the Legislative History

The legislative background of section 14, Third, clearly proves that it was not intended to outlaw the dual rate system. When the Alexander Committee dealt with "retaliation", it commented, 4 Alexander Report 288:

> Moreover, as has been repeatedly pointed out in this volume, *shippers require, above all else, a regular service,* and in this connection the testimony shows that by patronizing an outside line the shipper would not only *forfeit his rebates* but could ~~not~~ be penalized *by being denied*

[17] See Board decisions in F. M. B. Dockets No. 730, 725/751, and 743.

> *accommodations for future shipments even at the full rates of freight. Such retaliation* would leave the shipper unprotected since an independent line is not large enough to supply him with tonnage at all times.

It is obvious that the retaliation with which the Committee was concerned was (a) the forfeiture of accrued rebates, and (b) the blacklisting of shippers by denial of space for future shipments even at the full rate. The former evil could be, and was, cured by the prohibition of deferred rebates. That left unremedied the second evil, described by the Committee as deprivation of regular service (which "shippers require, above all else"), as denial of accommodations, and as being "unprotected" by having to rely only on such independent tonnage as may be available."[18]

And in making its ultimate recommendations, the Committee stated: "A considerable number of complaints were also filed with the Committee objecting to * * * the unfairness of certain methods—such as fighting ships, deferred rebates, and *threats to refuse shipping accommodations*—used by some conference lines to meet the competition of nonconference lines."

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[18] Repeatedly, wherever the Committee mentioned retaliation, it did so in terms that made it plain that they had in mind the concept of exclusion:

"* * * it was frequently suggested that the lines should be compelled to accept cargo from all shippers when offered with due regard to the proper loading of the vessel and the tonnage available, *and should be prohibited from refusing accommodations to any shipper by way of retaliation because* he may have shipped by an independent line, or may have filed a complaint charging unfair treatment, or for other unjust reasons." 4 Alexander Report 313.

4 Alexander Report 417. These methods were the ones condemned in section 14, Second, First, and Third, respectively. *Plainly, the Committee's recommended prohibition against retaliation was aimed at practices whereby shipments would be excluded from carriage. Under the dual rate system, there is never a denial of space or services; instead, the same space and services open to contract shippers are made available to the nonsignatory shipper at the full rate and, if he sees fit to sign, he may at any time do so and secure space at the contract rate.*

D. The Construction of the Court Below Places Unwarranted Emphasis on the Absence of the Adjective "Unjust" Before the Word "Discriminating" in the Phrase "Other Discriminating or Unfair Methods" While Failing to Recognize That the Concept of Unjustness is Clearly Implied

The decision below rests in the end on the exaggerated importance given to the absence of the single word "unjustly" as a modification of the word "discriminating" in section 14, Third. The Court below appears to hold that had the draftsmen added this routine word, the result would have been different (R. 241–242, 243, 244, 246).

As we have shown, the retaliation condemned by the Alexander Report was the refusal of space or service to shippers. The Committee's final recommendation was that "all carriers should be prohibited from retaliating against any shipper by refusing space accommodations when such are available, or by resorting *to other unfair methods* of discrimination * * *."

It is clear that the Committee was concerned about *unfair* discriminations, serving to exclude shippers from full service, and did not intend to make criminal discriminations which were fair or reasonable. In deed, the courts have held that the word discrimination, when used in a statute without any qualifying adjective, means *unjust* discrimination. As stated in *United States* v. *Wells Fargo Express Co.*, 161 F. 606, 610 (C. C.-N. D. Ill., 1908), "* * * It is difficult to conceive of the terms 'discrimination,' 'prejudice,' or 'disadvantage' as not associated with what is unjust, unreasonable, and undue." See also *Platt* v. *LeCocq.*, 150 F. 391, 397 (C. C. D. S. D., 1906), where the Court construed the unmodified words "prejudice and disadvantage" used in a South Dakota transportation statute to mean "unreasonable prejudice or disadvantage".

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted.

EDWARD D. RANSOM,
General Counsel, Federal Maritime Board.
EDWARD APTAKER,
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EDWARD SCHMELTZER,
Attorney,
Office of General Counsel.
WASHINGTON 25, D. C.
Date: January 24, 1957.

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13027

ISBRANDTSEN COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA AND FEDERAL MARITIME BOARD, RESPONDENTS

THE SECRETARY OF AGRICULTURE, INTERVENOR

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE, ET AL., INTERVENORS

ON PETITION FOR REVIEW OF ORDERS OF THE FEDERAL MARITIME BOARD

Decided November 9, 1956

Mr. John J. O'Connor for petitioner.

Mr. Daniel M. Friedman, Attorney, Department of Justice, with whom *Messrs. Neil Brooks*, Assistant General Counsel, United States Department of Agriculture, and *Donald A. Campbell*, Attorney, United States Department of Agriculture, were on the brief for respondent United States of America, and intervenor The Secretary of Agriculture, *Mr. Charles H. Weston*, Attorney, Department of Justice, also entered an appearance for respondent United States of America.

Mr. Edward D. Ransom, General Counsel, Federal Maritime Board, with whom *Messrs. James L. Pimper,* Assistant General Counsel, Federal Maritime Board, and *Edward Schmeltzer,* Attorney, Federal Maritime Board, were on the brief, for respondent Federal Maritime Board.

Mr. Elkan Turk, with whom *Messrs. James M. Landis* and *Elkan Turk, Jr.,* were on the brief, for intervenors Japan-Atlantic and Gulf Freight Conference, et al. *Messrs. Abba P. Schwartz, Seymour J. Rubin* and *Wallace M. Cohen* also entered appearances for intervenors Japan-Atlantic and Gulf Freight Conference, et al.

Before PRETTYMAN, FAHY and WASHINGTON, *Circuit Judges.*

FAHY, *Circuit Judge:* Pursuant to 64 Stat. 1130 (1950), 5 U. S. C. § 1034 (1952), Isbrandtsen Company, Inc., petitions as a party aggrieved for review of orders of the Federal Maritime Board which are described as a Report served December 14, 1955, and orders served December 21, 1955, and January 11, 1956. The respondents are the Board and the United States, the latter being a statutory respondent under section 1034, *supra.* The United States, however, represented by the Attorney General, has joined Isbrandtsen in attacking the validity of the orders under review. The intervenors are the Secretary of Agriculture, supporting Isbrandtsen, and the Japan-Atlantic and Gulf Freight Conference, defending the orders of the Board.

The Conference is a voluntary association of 17 steamship lines operating between Japan, Korea, and Okinawa, and the Gulf and Atlantic Coasts of North America. Five of the members are American, eight are Japanese, and four are of other nations. The primary purpose of the Conference is to establish and maintain agreed rates among the members. The

basic agreement under which the Conference operates was approved by a predecessor agency of the Federal Maritime Board in 1934 under section 15 of the Shipping Act of 1916, 39 Stat. 733, as amended, 46 U. S. C. § 814 (1952).[1]

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[1] Section 15 provides in pertinent part:

"Every common carrier by water * * * shall file immediately with the Federal Maritime Board a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the volume of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.

"The Board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.

"* * *

"All agreements, modifications, or cancellations made after the organization of the commission shall be lawful only when and as long as approved by the Board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

"Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1–11 and 15 of Title 15, and amendments and Acts supplementary thereto."

Isbrandtsen is not a member of the Conference, although membership is open to any common carrier regularly operating or intending regularly to operate in the trade. Since shortly after World War II Isbrandtsen has been the sole non-Conference line which has maintained a berth service in the Japan-Atlantic trade. This trade is overtonnaged and consequently the vessels of both Isbrandtsen and the Conference have had a substantial amount of free and usable space after completion of loading in Japan. Between 1947 and March 12, 1953, Isbrandtsen maintained its rates on most commodities an average of 10 percent below the rates established by Conference members under their agreement. Isbrandtsen's share of the business during this period was substantial, and its average carryings per sailing were much higher than were the average carryings of the Conference lines. In order to meet this competition the Conference members voted to adopt the exclusive patronage contract non-contract/dual-rate system described below, but when the Conference was restrained by this court from putting this system into effect prior to its approval by the Board the Conference, on March 12, 1953, opened the rates on ten major commodities. This permitted the member lines to set their own rates and to compete effectively with Isbrandtsen.

After March 12, 1953, rates dropped sharply, even to noncompensatory levels with respect to some commodities. In May, 1953, Isbrandtsen established minimum rates below which it would not go. This adversely affected its competitive position, so that since that date Isbrandtsen has carried little cargo in the trade.

On December 24, 1952, before rates had been opened by the Conference, it had filed with the Board, pur-

suant to the latter's General Order 76,[2] a statement advising the Board of the Conference's intention to institute in 30 days an exclusive patronage contract/non-contract dual-rate system in the Japan-Atlantic trade, hereinafter referred to as the dual-rate system. Under the proposed system shippers who declined to sign an exclusive patronage contract with the Conference would be charged rates 9½ per cent higher for the same transportation service than the rates charged shippers who enter into such contracts. Breach of the exclusive patronage contracts would be sanctioned by means of a liquidated damage clause under which a shipper who breaches the contract by shipping with a non-Conference line would be obligated to pay to the Conference 50 per cent of the contract rate on the shipment. The contract would be entered into for an indefinite period, subject to cancellation by either party on three months notice.

Protests against the proposed dual-rate system were filed by Isbrandtsen and the Department of Justice, who requested the Board to prohibit the Conference from implementing the system until after a hearing had been held. The Board granted the request for a hearing, but declined to suspend operation of the dual-rate system, stating that the system appeared to be in compliance with the Shipping Act.

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[2] Section 236.3 of that Order, 17 F. R. 10175, 46 C. F. R. 236.3, provides that steamship freight conferences proposing to establish contract/non-contract rates should file with the Board a statement containing:

"(a) The amount of the spread or differential * * *.

"(b) The effective date;

"(c) The reasons for the use of contract/non-contract rates in the particular trade involved, and the basis for the spread or differential between such rates; and

"(d) Copies of the form of all contracts pertaining thereto."

On petition for review in this court, we held that section 15 of the Act, note 1, *supra*, required the Board to approve the dual-rate system before it could legally be initiated. *Isbrandtsen Co.* v. *United States*, 93 U. S. App. D. C. 293, 211 F. 2d 51, *cert. denied*, 347 U. S. 990. Consequently we set aside the action of the Board allowing the system to go into effect without such approval, and enjoined the Conference from acting under the system until it was approved by the Board. Thereafter the Board's hearings resulted in its approval of the dual-rate system in the orders which are now here for review.

If the arrangements in question are such as the statute authorizes the carriers to make or the Board to approve, they are exempt from the inhibitions of the antitrust laws under section 15, note 1, *supra*. In providing for such exemption, however, the statute also places definite limits. For example sections 16 and 17 of the Act provide "it shall be unlawful" for any common carrier by water, alone or in conjunction with another, to

> "make or give any undue preference or advantage to any particular person,"

or to

> "demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers * * *."

The Board strongly urges that the dual-rate system cannot be said to give any "undue preference or advantage" or to constitute a demand, charge, rate or fare which is "unjustly" discriminatory. It says that because of competitive conditions in the trade the preference is not "undue" or the discrimination "unjust." In explaining these conditions the Board points to the differences in the operating costs of carriers of different nationalities, to the need for stability of rates and services, to freedom of any

steamship company to enter this trade in contrast to the requirements of the Interstate Commerce Act that there be a finding of public convenience and necessity, to the relationship between costs of operating and the quantity of cargo carried, and to other factors, all of which, in the view of the Board, are shown by the record and support the Board's findings that the inauguration of the dual-rate system is a necessary competitive measure to offset the harmful effect of non-Conference competition in an overtonnage trade subject to the injurious practice of undercutting of Conference rates. The Board points furthermore to its finding that the dual-rate system will decrease the possibility of continued rate wars with their disastrous consequences to American-flag lines, consequences repugnant to the purposes of the Act to encourage the development and creation of a naval auxiliary and reserve, and a merchant marine able to meet the requirements of the commerce of the United States with foreign countries.

We might agree wtih the Board that the objectives it seeks in approving the dual-rate system are consistent with the objectives of the statute; but these can be furthered only by means permitted by the statute. It is here that we find an insuperable barrier. Section 14, Third, of the Act provides that no common carrier by water shall

> "Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier * * * or for any other reason."

As we have seen, shippers who decline to sign an exclusive patronage contract with the Conference would be charged for the same transportation service rates

9½ per cent higher than those charged shippers who enter into such contracts, and breach of contract by one who does sign would entail liquidated damages of 50 per cent of the contract rate. While in terms the 9½ per cent higher rate is for failure to enter into an exclusive patronage contract rather than for actually shipping via a non-Conference carrier in reality the higher rate is for the latter, as are the liquidated damages. Each of these aspects of the dual-rate system is hinged to a shipper giving patronage to another carrier. This is explicit in the provision for liquidated damages, which is part and parcel of the dual-rate system and gives color to the whole; and it is implicit in the difference between the contract rate and the higher non-contract rate. When the latter is charged a shipper who has not entered into an exclusive patronage contract the substance of the matter is that a higher rate is charged because he ships by other than Conference carriers. The industry is concerned with the business of shipping, to which the making of contracts is but an incident. Both provisions, therefore, come within a fair meaning of retaliation. Furthermore, even though the shipper has not patronized another the higher rate constitutes retaliation because it is charged for failure to contract with the Conference. Section 14, Third, applies not only to retaliation for shipping by another carrier but for "any other reason," which would include failure to enter into the exclusive contract arrangement. True it is, as the Board urges with much persuasion, the dual-rate system may be very potent in promoting stability and regularity of service and may be warranted by competitive considerations; but when at the same time the system constitutes retaliation and is also discriminatory it runs into the barrier of section 14, Third, however desirable it otherwise might be. That provision prohibits not only

retaliation by a refusal, or threat of refusal, of available space accommodations but also by "resort to other discriminating" methods. In the circumstances stated, the charge of a higher rate for the same service and facilities, or the imposition of the liquidated damages, is *prima facie* discriminatory, *Swayne and Hoyt, Ltd.* v. *United States,* 300 U. S. 297, and for the reasons we have outlined we think that it is also a method of retaliation. This is the thrust of these provisions under a fair reading of the language adopted by Congress. And since these provisions are unlawful the system containing them cannot validly be approved by the Board.

We cannot accept the argument that section 14, Third, must be re l, in view of the terms of the Act as a whole, to condemn only retaliation which the Board might on a particular record find "unfair" or "unjustly discriminatory," terms used in other parts of section 14 and in sections 15 and 17. Where the conduct is retaliatory and constitutes discrimination, it is unlawful without more, unless its impact is unsubstantial, a subject we need not consider. Absent retaliation a preference or discriminatory rate is unlawful only if undue, unreasonable, unfair or unjust. Whether or not these characteristics exist depends upon the facts and circumstances of the case as found by the Board; and the courts will not substitute their judgment in this regard for that of the Board. *Swayne and Hoyt, Ltd.* v. *United States, supra.* There the court in effect approved an order of the Secretary of Commerce, the predecessor of the Board, which had condemned a higher rate for a shipper who used a carrier other than a member of the Conference. The court said the differential was *prima facie* discriminatory since the two rates were charged for identical services and facilities leaving for decision in the first instance by the Secretary, the question

whether the discrimination was "undue" or "unreasonable." The Secretary having concluded that it was, the court, considering the case under section 16, would not disturb his conclusion, which was in part based upon his finding that the operation of the contract system in the circumstances "does not differ substantially from that of 'deferred rebates' outlawed in both foreign and coastwise shipping by § 14 of the Shipping Act * * *." Since the dual-rate system here constitutes retaliation it must be condemned without regard to the question of its reasonableness, as are deferred rebates. For while it is not one of the methods specifically condemned by section 14, as are deferred rebates and fighting ships, nevertheless retaliation is specified in subparagraph Third of section 14 as a method which may not be resorted to when discriminatory.

We are aware that the dual-rate system has not been held by any judicial decision to be invalid under section 14, Third; that is, without regard to the reasonableness or justness of the discrimination inherent in the system. We have already referred to *Swayne and Hoyt, Ltd.* v. *United States, supra,* which, though it upheld the Board in condemning the dual-rate system there involved, did not rest upon section 14, Third. In *Far East Conference* v. *United States,* 343 U. S. 570, the court, adhering to principles previously laid down in *United States Navigation Co.* v. *Cunard Steamship Co.,* 284 U. S. 474, required the District Court to dismiss a suit of the United States which attacked the dual-rate system as violative of the Sherman Act without the particular system having been passed upon initially by the Board. And in *A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Co.,* 342 U. S. 950, the court by an equally divided vote affirmed *Isbrandtsen* v. *United States,* 96 F. Supp. 883, which had invalidated the dual-rate system there in-

volved, not under section 14, Third, but because the spread between the two rates was found to be arbitrary. From this situation in the courts the Board contends that the dual-rate system has not been considered invalid *per se*, otherwise the courts would have disposed of these cases on that ground. This position is an arguable one; but the fact is that the cases do not decide the point. And for the reasons which we have indicated we are of the opinion that additional legislation would be needed to permit the system, in the form here approved by the Board, to obtain the approval of the courts. Congress, after long consideration, lodged very substantial powers in the Board; but we find no language in the statute which, given its fair meaning, permits the Board to grant exemption from the anti-trust laws, or to make lawful a discriminatory rate, or the imposition of liquidated damages, for patronizing a competitor, for refusal to enter into an exclusive patronage contract with conference members, or for not shipping exclusively in accordance with such a contract.

We have considered the legislative history, particularly pertinent parts of H. R. Doc. No. 805, 63d Cong., 2d Sess. (1914), known as the Alexander Report. The evils afflicting the industry due to uncontrolled competition on the one hand and unregulated carrier combinations on the other, are analyzed in this basic study preceding the Act. Reference is also made to H. R. Rep. No. 659, 64th Cong., 1st Sess. (1915);[3] H. R. 14337, 64th Cong. 1st Sess. (1915); S. Rep. No. 689, 64th Cong., 1st Sess. (1915).[4] We have found in this

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[3] This Report at pp. 30–31 refers to retaliation by refusing space accommodations or "other unfair methods of discrimination."

[4] In this Report, at p. 5, section 15 of H. R. 15455 is described in part as forbidding "retaliation, etc., against a shipper because such shipper has patronized any other carrier."

history no indication of an explicit intention by Congress to outlaw the dual-rate system, as is found with respect to deferred rebates and fighting ships. Furthermore, it is clear from its history, as from the Act itself, that not all discriminatory practices, and preferences are unlawful. On the contrary, the Board is authorized to approve many methods, including the formation of the conferences themselves, which would be unlawful except for the Act and Board action thereunder. But it is significant that when Congress came to the matter of retaliation against a shipper it did not permit this particular type of conduct to be engaged in or to be approved by the Board if it involved any discriminating method.[5]

Finally, we have considered the Board's position that the enumeration of deferred rebates and fighting ships as practices absolutely prohibited, in contrast with the failure to include in such enumeration the dual-rate system, indicates that the latter was not to be considered illegal *per se*. We do not accept this position because to do so would seem to us to give little meaning to the important provision of section 14, Third, that retaliation for any reason is also absolutely prohibited if it constitutes discrimination. We think it clear not only that the liquidated damage provision is discriminatory but that a 9½ per cent differential for exactly the same service and facilities is of like character. Further discussion of the mat-

[5] Compare H. R. 17328, 63d Cong., 2d Sess., section 2, Third, with H. R. 15455, 64th Cong., 1st Sess., showing changes which add "unjust" to "discrimination" in certain parts in the Bill, but not in section 2, Third, which corresponded with section 14, Third, of the Act, where discrimination without qualification is prohibited when used as retaliation.

ter appears in Judge Washington's concurring opinion "in which, as in the present opinion, we all concur." *Walker* v. *Popenoe*, 80 U. S. App. D. C. 129, 131, 149 F. 2d 511, 513 (1945).

The orders of the Board will be set aside insofar as they approve the exclusive patronage contract/noncontract rate system.

WASHINGTON, *Circuit Judge*, concurring: I fully concur in Judge Fahy's opinion. However, certain additional observations may be made, with which both my colleagues agree, and which they have asked me to express on behalf of the court.

The crucial question on this appeal is of course whether Section 14, Third, of the Shipping Act of 1916[1] proscribe the type of contract here involved.

In the first place, it seems clear that in actual practice the contract system is being used to penalize a shipper because he has patronized another carrier, or at least reserved the right to do so. Is this "retaliation," proscribed by the Act? Certainly there seems no reason to limit "retaliation" to the dictionary definitions of "returning like for like" or "evil for evil," which have been selected by the Board. The very example used by the statute, boycotting for use of another carrier, is not "like for like," nor are the boycotting carrier or group of carriers necessarily imbued with ideas of doing evil. But detriment to the independent shipper and the independent carrier plainly results.

Are these contracts, then, the sort of "discriminating or unfair methods" that the statute sought to anticipate? That the contract system comes within the literal meaning of this phrase is clear. As the Supreme Court observed in *Swayne & Hoyt, Ltd.* v.

[1] 39 Stat. 733, as amended, 46 U. S. C. § 812, Third (1952).

United States, 300 U. S. 297, 303 (1937), a contract system under which different prices are charged for the same transportation of identical cargoes to identical ports under identical circumstances is "prima facie discriminatory."[2] Nevertheless, the Board urges that the literal meaning of the statute should not be followed.

The Board's basic contention is this: Since dual rate contracts were considered by Congress in its survey of shipping practices, the conspicuous absence of this device from the list of those specifically barred—deferred rebates, fighting ships, and boycotts—demonstrates an implied congressional endorsement of this devise. Were the premise sound, the argument would have some merit. But the fact is that the contracts examined by the Alexander Committee in 1913 were materially different from the contracts before us now. The 1913 contracts were bona fide requirements contracts. The sellers (carriers) undertook a firm obligation to provide space; both parties undertook firm obligations as to the price. And since the price was fixed for the term of the contract (usually 6 months), the price figure in the contract represented a hedge

[2] It is urged that footnote 3 of the Court's opinion in *Swayne & Hoyt* is some authority for exempting the contracts in this case from Section 14, Third. There are two answers to this argument. First, the Court was there concerned not with a recommendation of the Alexander Committee but with an argument that had been addressed to the Committee. See H. R. Doc. No. 805, 63rd Cong., 2d Sess. 307 (1914). Second, and more significant, is the fact that the contracts considered in *Swayne & Hoyt* closely follow the outlines of the contracts reviewed by the Alexander Committee in 1913, which are materially different from the contracts in this case, see text *infra*. The contracts in *Swayne & Hoyt* contained a firm price agreement that could not be varied during the term of the contract. See *Swayne & Hoyt* v. *United States*, 18 F. Supp. 25, 26 (D. D. C. 1936).

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H. Res. 203, 63rd Cong., 1st Sess. 34
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H.R. 10500, 64th Cong., 1st Sess. 28
H.R. 14337, 64th Cong., 1st Sess. 41
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H.R. 15455, 64th Cong., 1st Sess. 34

Legislative Reports:

Alexander Report—H. Doc. 805, 63d Cong., 2d Sess. ..... *passim*
H. Rept. 659, 64th Cong., 1st Sess. 34, 61
S. Rept. 689, 64th Cong., 1st Sess. 34
Report of the Magnuson Subcommittee of the Senate Committee on Interstate and Foreign Commerce (S. Rept. No. 2494, 81st Cong., 2d Sess. August 30, 1950) 30

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on the part of both parties against fluctuations in rates.[3] In the contracts in suit the carriers' commitment as to space is almost illusory,[4] being a commitment to carry "so far as regular services are available." The price aspect of the contract is in terms subject to increases. Thus, the two principal considerations normally given to a buyer (the shipper) under a requirements contract—guarantee of supply and guarantee of no rate increase—are here lacking.[5] In their stead are two essentially penal provisions—the higher rate and the liquidated damage clause—both imposed to coerce shippers to refrain from using non-Conference carriers.[6] These differences are dis-

[3] For the text of the contracts considered by the Alexander Committee, see *Proceedings of the House Committee on the Merchant Marine and Fisheries*, 62nd Cong., 2d Sess., Vol. 1, pp. 97, 120, 289 (1913). For the Committee's summary of these contracts, see H. R. Doc. 805, *supra* at 290–91. In most of these contracts the price term was fixed as against increases, but shippers were entitled to any decreases in the regular tariffs. In other contracts the price stated was binding on both sides. See MARX, INTERNATIONAL SHIPPING CARTELS 202 (1953).

[4] See 1 CORBIN, CONTRACTS § 16 (1950).

[5] See, generally, Stockhausen, *The Commercial and Anti-Trust Aspects of Term Requirements Contracts*, 23 N. Y. U. L. Q. 412, 413 (1948).

[6] This is not to suggest that the liquidated damage clause would necessarily be unenforceable as a penalty, *cf. Pacific Westbound Conference* v. *Leval & Co.* (unreported) (Cir. Ct. Ore. 1951), cited in *Marx*, *supra* at 209, though it might be. See 5 CORBIN, CONTRACTS § 1054 (1951). It may be noted that compliance with the contracts used in 1913 was in many instances secured not by deferred rebates, see *Proceedings*, *supra* at 99, 204, 278, or by penalty clauses, *id.* at 96, but by threat of future boycotting, *ibid.*, a device specifically condemned in Section 14, Third. The contracts in this case would substitute for this blunt weapon the more refined techniques of penalty rates and liquidated damage clauses. Thus, instead of a retaliatory device to enforce a bona fide requirements contract, there are now retaliatory contracts, enforced by methods of seemingly equal effectiveness.

positive of the Board's principal argument. Implied congressional approval of a bona fide requirements contract is no basis for exempting the contracts in this case from the plain meaning of "discriminating or unfair methods." They must therefore be condemned.

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Principles of Ocean Transportation, Johnson & Huebner, (Appleton & Co., N.Y., 1918) 25, 26, 27, 30, 41
International Shipping Cartels, Marx, Daniel, Jr. (Princeton University Press, 1953) 27

APPENDIX B

STATUTES INVOLVED

A. Selected provisions of the Shipping Act, 1916 (extracted from Title 46, U. S. C. A.)

SEC. 14. (46 U. S. C. sec. 812.) No common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

First. Pay or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow a deferred rebate to any shipper. The term "deferred rebate" in this chapter [Act] means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term "fighting ship" in this chapter [Act] means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade.

Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when

such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $25,000 for each offense.

* * * * *

SEC. 15. (46 U. S. C. sec. 814.) Every common carrier by water or other person subject to this chapter [Act], shall file immediately with the commission [board] a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter [Act], or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement"

in this section includes understandings, conferences, and other arrangements.

The commission [board] may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter [Act], and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the commission [board] shall be lawful until disapproved by the commission [board]. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the commission [board].

All agreements, modifications, or cancellations made after the organization of the commission [board] shall be lawful only when and as long as approved by the commission [board], and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1–11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

Sec. 16. (46 U. S. C. Sec. 815).

It shall be unlawful for any common carrier by water, or other person subject to this Act, either alone

or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this Act.

Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense.

Sec. 17. (46 U. S. C. 816.) No common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collect-

ing any such unjustly discriminatory or prejudicial rate, fare, or charge.

* * * * *

SEC. 22. (46 U. S. C. sec. 821.) Any person may file with the commission [board] a sworn complaint setting forth any violation of this chapter [Act] by a common carrier by water, or other person subject to this chapter [Act], and asking reparation for the injury, if any, caused thereby. The commission [board] shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the commission [board] satisfy the complaint or answer it in writing. If the complaint is not satisfied the commission [board] shall, except as otherwise provided in this chapter [Act], investigate it in such manner and by such means, and make such order as it deems proper. The commission [board], if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

The commission [board], upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this chapter [Act].

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No. 73

No. 73

In the Supreme Court of the United States

OCTOBER TERM, 1957

FEDERAL MARITIME BOARD, *Petitioner*

v.

ISBRANDTSEN COMPANY, INC., UNITED STATES OF AMERICA, AND SECRETARY OF AGRICULTURE

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONER FEDERAL MARITIME BOARD

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 73

FEDERAL MARITIME BOARD, *Petitioner*

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Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Appeals (R. 237-251) is reported at 239 F. 2d 933 (D.C. Cir. 1956).

JURISDICTION

The judgment of the Court of Appeals was entered November 9, 1956 (R. 250). The Federal Maritime Board petitioned for a writ of certiorari on January 7, 1957; the writ was granted March 25, 1957, 351

U.S. 994. The jurisdiction of this Court rests on 28 U.S.C. 1254(1) (62 Stat. 928), as prescribed by 5 U.S.C. 1040 (64 Stat. 1132, Section 10).

QUESTION PRESENTED

Section 15 of the Shipping Act, 1916, authorizes the Federal Maritime Board[1] to approve agreements between ocean carriers "fixing or regulating transportation rates or fares; giving or receiving special rates" or "controlling, regulating, preventing, or destroying competition". Section 14, Third, forbids the carrier to "Retaliate against any shipper by refusing * * * space accommodations * * * or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier * * * or for any other reason." The question is whether the Board, upon a finding that it is not "unjustly discriminatory," may under Section 15 approve a so-called "dual rate system" by which lower rates are charged shippers who agree to use only lines which are members of the steamship conference, or whether the dual rate system is illegal *per se* under Section 14, Third.

STATUTE INVOLVED

The pertinent provisions of the Shipping Act, 1916, as amended, 39 Stat. 728, *et seq.*, 46 U.S.C. 801 *et seq.*, are set forth in Appendix A.

[1] "Board", as used in this brief, refers to the Federal Maritime Board and its predecessor agencies. The United States Shipping Board was created by the Shipping Act, 1916 (46 U.S.C. 801, 39 Stat. 728), and was succeeded by the Secretary of Commerce by Executive Order 6166, June 10, 1933, by the United States Maritime Commission by the Merchant Marine Act, 1936, Section 204(a) (46 U.S.C. 1114, 49 Stat. 1987) and by the Federal Maritime Board by Reorganization Plan No. 21 of 1950, Section 104 (15 F.R. 3178).

STATEMENT OF THE CASE

The Japan-Atlantic and Gulf Freight Conference (the "Conference") is a voluntary association of common carriers by water serving the inbound trade from Japan to ports on the United States Atlantic and Gulf coasts. The Conference exists by virtue of its organic agreement, F.M.B. No. 3103, approved by the Board on June 25, 1934 (R. 24), under Section 15, Shipping Act, 1916 (herein referred to as "the Act").

Section 15 (46 U.S.C. 814; see Appendix A, pages 76-79, *infra*) authorizes the Board to approve certain types of agreements among common carriers by water or among other persons subject to the Act, including, among others, agreements fixing rates or giving special rates, or controlling or destroying competition. Agreements subject to Section 15 are exempt from the anti-trust laws. The section authorizes the Board to disapprove any agreement "* * * whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of [the Shipping Act, 1916] * * *" and directs that it "shall approve all other agreements * * *."

On December 24, 1952, the Conference filed a statement with the Board announcing the intention to initiate a system of rates of the type commonly known in ocean transportation as a "dual rate system." The Conference's proposal resulted from conditions in the trade, discussed below, which subsequently were found by the Board to justify the use of the system.

Under the proposed dual rate system, as in the systems employed by many conferences in other foreign trades, contract rates on virtually all commodities would be given to those shippers promising to ship exclusively via Conference vessels, and all other shippers would be charged a tariff rate 9½ percent higher than the contract rate. The shipper's promise is embodied in a "Shipper's Rate Agreement" (R. 203-206) which provides for liquidated damages to be assessed against a contracting shipper who has violated the contract by shipping via a non-Conference line; the damages are 50 percent of the contract freight rate. Thus, the dual rate system contemplates two levels of rates, separated by a fixed differential, the lower of which is made available to shippers who agree to patronize the Conference members exclusively.

After receiving protests against the Conference proposal by Isbrandtsen Company, Inc. (Isbrandtsen) on January 12 and January 19, 1953 (R. 207-209), and by the Department of Justice (R. 209-211), the Board, on January 21, 1953, ordered a hearing on the protests.[2] The Department of Agriculture intervened in opposition to the Conference proposal.

A complete hearing was held before a hearing examiner of the Board, who upheld the legality of the proposed dual rate system (R. 22). Exceptions to the Examiner's recommended decision and replies

[2] The same order also permitted the Conference to put its proposed dual rate system into effect pending the hearing. This portion of the order was set aside by the United States Court of Appeals, District of Columbia Circuit, in *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51 (1954), which held that the proposed dual rate system was an agreement within the meaning of Section 15, and hence could not be put into effect without prior formal approval by the Board.

thereto were filed, and oral argument was heard by the Board. The Board issued its Report on December 14, 1955 (R. 49-69), and on December 21, 1955, and January 11, 1956, the Board issued orders approving the Conference agreement adopting the dual rate system (R. 73-74).[3]

By stipulation of the parties,[4] the findings of fact made by the Board in its Report of December 14, 1955, are to be taken as true for purposes of judicial review (R. 232, 235). These findings, leading to the Board's approval of the Conference proposal, may be summarized as follows:

The Conference is a voluntary association of seventeen steamship lines. The present Conference membership includes five United States-flag lines, eight Japanese-flag lines, and four lines of other foreign nationalities (R. 23).

Since World War II, Isbrandtsen has furnished the only non-conference berth (or common carrier) service in the trade. From 1947 to early 1949, Isbrandtsen operated westbound from Japan to United States Atlantic ports via the Suez Canal. Since early 1949, it has operated an approximately fortnightly service from Japan to United States Atlantic ports via the Panama Canal as part of its eastbound, round-the-world service (R. 25).

Conference membership is open to any common carrier regularly operating or intending so to operate in

[3] The January 11 order clarified the December 21 order.

[4] By Prehearing Stipulation in the Court below dated February 20, 1956, as amended by the Court's order dated March 16, 1956, the parties agreed that Board approval of the dual rate system in "the particular trade herein involved," should be reviewed "on the basis of the facts existing in the administrative record as found by the Board . . . ." (R. 230-235).

the trade. Isbrandtsen has remained outside the Conference as a matter of choice, although invited to join (R. 25).

The trade is overtonnaged; that is, there is a considerable excess of vessel space over cargo offerings. Total sailings have risen sharply since World War II: from 109 in 1949 to a projected 300 in 1953 (R. 27). American-flag lines,[5] carried 53 percent of the total berth cargo in the trade in 1950, 46 percent in 1951, 34 percent in 1952, and 21 percent in the first six months of 1953. The Japanese lines, which began to re-enter the trade in 1951, have carried an increasing share of the traffic; by the first half of 1953 their participation had risen to 66 percent of the total (R. 27-28). The vessels both of the members of the Conference and, to a lesser extent, of Isbrandtsen, had substantial free space after completion of loading in Japan (R. 28).

Between 1947 and March 12, 1953, Isbrandtsen maintained its rates on most commodities, on the average, at a level approximately 10 percent below the corresponding Conference tariff rates. Conference increases in rates were followed promptly by Isbrandtsen increases, and when, in November 1952, the Conference announced a 10 percent reduction in rates, Isbrandtsen announced that its new rates would be 10 percent less than the effective Conference rates (R. 29). Because Isbrandtsen uniformly followed Conference rate increases with corresponding increases in its own rates, its participation in the trade, prior to the outbreak

[5] Lykes Bros. SS Co. serves United States Gulf ports only; American President Lines operates from Japan to Atlantic ports of the United States via the Suez Canal as a part of its westbound, round-the-world service. Neither line's carryings are materially important in point of volume in the Conference trade, and they are not included in the data above.

of the rate war, had little practical effect on the rate level (R. 68).

The Conference is at a competitive disadvantage as compared with individual lines in making rapid rate changes, because changes in Conference rates may only be made by an affirmative vote of two-thirds of the voting members (R. 30).

In 1950, 1951 and 1952, respectively, Isbrandtsen made only 13 percent, 11 percent, and 10 percent of the sailings, yet carried 34 percent, 30 percent and 26 percent of all the cargo moving in the trade (R. 27). Isbrandtsen in 1952 carried more cargo with 24 sailings than did the non-Japanese conference lines with 132 sailings (R. 61). There were indications that Isbrandtsen had planned to increase its service to three or four sailings per month; this led the conference to apprehend a further increase in Isbrandtsen's participation, most probably at the expense of the non-Japanese Conference lines which did not enjoy as an offsetting factor the nationalistic preference of Japanese shippers (R. 61).

At a special meeting on March 12, 1953, the Conference voted to open rates[6] on ten of the major commodities moving in the trade in order to meet Isbrandtsen's competition. Subsequently, the Conference voted to open rates on most of the commodities that move in substantial volume in the trade (R. 30). After March 12, 1953, the level of rates dropped, first, to about 80 percent, and later to about 30 to 40 percent of the pre-March 12 level. On a fairly large number of items, some lines have charged rates as low as $6.00-6.50 per

[6] By opening rates, Conference members discontinue the collective fixing of rates. Each member becomes free to fix its own rates independently of the other members.

ton, while the mere cost of loading and discharging the cargo in this trade is approximately $8.50 per ton. Isbrandtsen tried at first to keep on a competitive basis in the rate war until mid-May 1953, when it set minimum rates. Since the rate war, Isbrandtsen has carried little cargo in the trade (R. 31).

Many Japanese shippers have requested the Conference to close rates and to end the rate war. The instability resulting from the rate war has adversely affected the smooth flow of commerce between Japan and the United States; has raised a threat that customs duties on Japanese products in the United States might be increased; has affected the value of inventories of Japanese goods in the United States; and has caused requests for postponement of shipment by f.o.b.[7] buyers in the United States, since such buyers assume the risk of fluctuating freight rates. Resale prices of Japanese goods are often fixed by the importers as much as six months in advance of their arrival in the United States (R. 32).

Each of the shippers testifying before the Board in this proceeding gave his general support to the use of dual rates as proposed by the Conference (R. 33).

In the light of these facts, the Board considered inauguration of a dual rate system to be necessary to enable the Conference to meet its non-conference competition (R. 60). It found that the only other way the conference lines could meet Isbrandtsen's competition was by rate-cutting, which would eliminate the other U.S.-flag lines along with Isbrandtsen; this the Board considered contradictory of the purpose of the Act (R. 64). The Board found that institution of the

[7] Most commodities in this trade are sold on a f.o.b. basis (R. 32).

dual rate system would result in greater stability of rates and service, facilitate trading on the basis of advance commitments, and decease the threat of rate wars (R. 61-62). The Board further found that the 9½ percent spread was reasonable and would probably allow Isbrandtsen to retain 10 percent or more of the cargo moving in the trade which would be at least an equitable share (R. 62). The Board ultimately found that the proposed system was not unjustly discriminatory or unfair or likely to operate to the detriment of the foreign commerce of the United States, or in violation of the Shipping Act (R. 69).

Isbrandtsen petitioned the Court below to review the Board's orders and applied for an interlocutory injunction pending such review. On February 10, 1956, an interlocutory injunction was granted. On November 9, 1956, the Court decided on the merits that the Board may not approve the dual rate system in any case because the system is necessarily retaliatory and discriminatory within the meaning of Section 14, Third. That decision is here under review.

SUMMARY OF ARGUMENT

The court below, 40 years after enactment of the Shipping Act, 1916, has given it an unprecedented interpretation. It has accepted the Board's finding that the dual rate system here involved is not "unjustly discriminatory" but has held it illegal *per se* because it found an absolute prohibition in Section 14, Third. The decision is without support in the statutory language and produces a result contrary to that which the Congress plainly intended.

I

The literal reading of Section 14, Third, would make it unlawful for any common carrier by water to "resort to other discriminating * * * methods * * * for any other reason." This reading cannot be accepted, as it would convert most of the Act into surplusage or contradiction. The court below did not accept the literal reading but assumed that "resort to * * * discriminating * * * methods" was modified by two other clauses of the section: that condemning retaliation, and that describing the motive as because of patronage of another carrier. This reduces the areas of contradiction, but still cannot be accepted, for it makes the whole of Section 14, First, describing and forbidding deferred rebates into meaningless surplusage.

The proper reading of Section 14, Third, requires no such juggling of grammar. Instead one need apply only the standard and routine rule of *ejusdem generis* that "other," following an enumeration, is to be read as "similar." Adoption of this elementary precaution eliminates all surplusage and contradiction, and makes Section 14, Third, comport precisely with what the Congress plainly intended.

II

The Shipping Act, 1916, was the result of a comprehensive inquest into ocean shipping by the House Committee on Merchant Marine and Fisheries. Its report, known as the Alexander Report, is the foundation of that Act. The Congress in consequence of that report had full knowledge of both the abuses and the needs of ocean shipping.

The Alexander Committee recommended the statu-

tory approval of steamship conferences because "The entire history of steamship agreements shows that in ocean commerce there is no happy medium between war and peace when several lines engage in the same trade." 4 Alexander Report 416. The struggle for cargo may at any time break into a rate war. This is because of six disruptive factors: (1) there is little difference in the operating cost of a vessel filled to capacity, and one sailing only half full; (2) a liner service must regularly send vessels, which are units of large capacity, into ports on the route it has developed, whether the cargo offerings are large or small; (3) there is complete freedom of entry by competitors into any international trade route; (4) there is no governmental authority to fix minimum rates; (5) there is large disparity in capital and operating costs between vessels under different flags, a factor which consistently operates to the drastic disadvantage of American-flag vessels; and (6) where outbound traffic largely exceeds inbound, there is necessarily too much inbound capacity.

An effective conference operating under the provisions of the Act can normally prevent the outbreak of rate wars. When, however, a trade becomes overtonnaged and a strong independent line exists, it is usually impossible for a conference to control rates merely by agreement among member lines. By undercutting the rates adhered to by the conference lines, the independent line can divert substantial and profitable quantities of traffic from member lines. In many cases this causes conference lines, either individually or by agreement, to abandon the tariff and meet the independent's competition. A ruinous rate war is the result. This is no more beneficial to shippers than to carriers, for the

nature of foreign commerce requires predictable and relatively stable rates.

The dual rate system enables a conference to meet the competition of independent lines, without resorting to a costly and disruptive rate war.

III

The legislative history of the Shipping Act, 1916, conclusively demonstrates that Congress impliedly approved the dual rate system where it is needed to promote stability in a trade. The methods used prior to 1916 by conferences to meet the competition of non-conference lines are precisely described in the report of the Alexander Committee. Among these were the dual rate system and two others—deferred rebates and volume discounts—somewhat similar to it. The Committee condemned the latter methods, while it described the dual rate system in terms free of any hint of disapproval. Unlike the deferred rebate system, the Committee said, "the ordinary discount system does not place the shipper in the position of continual dependence" and unlike the volume discount system, the dual rate system [gives] the small shipper the same contract rates as the larger shippers." These distinctions between the ordinary contract rate system, on the one hand, and the deferred rebate and volume contract system, on the other, were of central, rather than peripheral, importance in not only the Committee's thinking, but also in the structure of the ensuing legislation, for they were transferred bodily into Section 14 of the resulting enactment.

Section 14, Fourth, forbids unwarranted volume discounts. Section 14, First, outlaws deferred rebates, and defines that practice in the most precise terms.

Section 14, Third, which the Court below construed as a prohibition of the dual rate system, contains no references to rates or contracts. On the contrary, after condemning retaliation by refusal of space, it makes general reference to "resort to other discriminating or unfair methods", because a shipper has patronized another carrier "or for any other reason." The excessively broad construction placed by the Court below on Section 14, Third, makes Section 14, First, wholly superfluous, and it obliterates the fact, important in the Alexander Committee's deliberations, that the "ordinary contract system does not place the shipper in the position of continual dependence that results from the deferred rebate system."

Because there can be no reconciliation between the holding below and the legislative history, the two opinions of the Court of Appeals are fundamentally inconsistent, even though all three judges concurred in both. The principal opinion, written by Judge Fahy, pays little or no attention to the legislative history, and finds the dual rate system illegal *per se*.

In contrast, the concurring opinion of Judge Washington does attempt to deal with the legislative history, but rejects the Board's arguments because, it says, the dual rate contracts considered by the Alexander Committee and given "implied congressional endorsement" (R. 247) were "requirements contracts" which provided the buyer a "guarantee of supply and guarantee of no rate increase . . ." (R. 247). In fact, the 1913 contracts described by the Alexander Committee are not materially different from the contracts in the instant case. The essence of both contracts is the promise of exclusive patronage by the shipper and the entitlement in return to a discount rate. The so-called

"requirements contracts," moreover, would themselves be equally retaliatory under the principal opinion.

Congress had clear warning from a committee of steamship lines (*infra*, p. 54) and from the recommendations in the Report of the Royal Commission on Shipping Rings (*infra*, p. 51), which are embodied in part in the Alexander Report, that if the deferred rebate system were outlawed it would inevitably be replaced by the contract rate system or a volume discount system. The Shipping Act did, in fact, outlaw the deferred rebate system in carefully circumscribed language, and it further prohibited unfair volume discount systems. It therefore must be read as impliedly approving the contract rate system which would inevitably replace the two condemned methods.

The Alexander Report removes all uncertainty that the prohibition against retaliation in Section 14, Third, was aimed only at the retaliatory denial by a line or lines of *service* to a shipper who had patronized a competing line or had otherwise incurred the displeasure of the carrier and not at any system of monetary discount such as the contract rate system. The shipper, it said (4 Alexander Report 288)—

> "could be penalized *by being denied accommodations for future shipments even at the full rates of freight. Such retaliation* would leave the shipper unprotected since an independent line is not large enough to supply him with tonnage at all times."

It is obvious that the retaliation with which the Committee was concerned was the blacklisting of shippers by denial of space for future shipments even at the full rate. Its language is concerned with denials

of *service*, of *vessel space;* on its face it has nothing to do with the imposition of a rate differential, or the payment of liquidated damages for a breach of the shipper's contract which the court below erroneously held to be retaliation. So far as contract systems based on *monetary* considerations were involved (such as the dual rate system), the Committee laid down the standards of legality with its recommendations against deferred rebates, unfair volume contracts, undue or unreasonable preferences or advantages, and unjust discriminations; recommendations translated by Congress into Sections 14, First, 14, Fourth, 16 and 17, respectively. And by its condemnation of retaliation, the Committee and Congress meant to prohibit as unlawful *per se* the enforcement of faithful patronage by *denial of service* by the carriers, a feature absent from the dual rate system.

Upon the slender thread of the omission of the routine word "unjustly" or "unfairly" in front of the word "discriminating" depends the reasoning of the Court below—central to its decision—that Congress in Section 14, Third, meant to condemn *any* discrimination, whether just or unjust, fair or unfair, substantial or insubstantial. This reasoning, even assuming *arguendo* that dual rates are retaliatory within the meaning of Section 14, Third, is inconsistent with that of other courts which have held that in a regulatory statute the bare term "discrimination" must be read to mean "unjust discrimination."

IV

The decisions of this Court establish that the dual rate system falls within the boundaries of lawfulness laid down in the Shipping Act. In *U. S. Navigation*

Co. v. *Cunard S. S. Co.*, 284 U.S. 474 (1932), this Court rejected the argument that the dual rate system was as a pure matter of law illegal under Sections 14 and 17 of the Shipping Act. Instead, the Court held that there were issues of fact and discretion which must first be resolved by the Board.

In *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297 (1937), this Court overruled the holding of a three-judge District Court to the effect that the dual rate system was illegal *per se*. Instead, this Court laid down the doctrine that:

> "In determining whether the present discrimination was undue or unreasonable the Secretary was called upon to ascertain whether its effect was to exclude other carriers from the traffic, and if so, whether, as appellants urge, it operated to secure stability of rates with consequent stability of service, and, so far as either effect was found to ensue, to weigh the disadvantages of the former against the advantages of the latter." (p. 304)

Most recently, in *Far East Conference* v. *United States*, 342 U.S. 570 (1952), this Court held that the question of the legality of the dual rate system falls within the primary exclusive jurisdiction of the Board, notwithstanding the argument rejected by the Court that such referral to the Board would be useless if, as was contended by the respondents, the dual rate system was unlawful *per se* under Section 14, Third.

The Shipping Board, the Secretary of Commerce, the Maritime Commission and the Federal Maritime Board, as each has succeeded to the responsibility of administering the Shipping Act, 1916, have ruled that dual rate systems are not invalidated by Section 14, Third, but will be approved or disapproved under Sec-

tion 15 according to the facts of each case. The responsible agency's interpretation of its governing statute is entitled to particular respect when the activity is so specialized as ocean shipping, and when the interpretation has been so long continued. Yet neither opinion of the court below even mentions this course of administrative rulings extending back for more than a generation.

The Board over this period has developed, in a sizeable series of contested cases; a set of highly discriminating standards to judge whether or not a particular dual rate system is unduly discriminatory. Approval under Section 15 will not be granted if one or a few lines would monopolize the trade; if the intercoastal trade, subject to Government rate control, is involved; if conference membership is not open to all on reasonable terms; if it is used to prevent use of other loading areas; if damages for breach are retroactive or unduly heavy; if the dual rate system will not remedy the causes of instability in the trade; if it will drive the non-conference lines out of the trade; if it will prevent use of the non-conference lines; if the differential is too high; or if it covers commodities not subject to non-conference competition.

Only if the dual rate system survives these tests will it be approved, and then only if it is shown that it is necessary to avoid rate wars, to permit forward-trading by shippers, and to assure rate stability and regularity of service.

This, we submit, adds up to a proper application of the criteria that were intended by Congress in the enactment of Sections 15, 16, and 17, to control the use of the dual rate system by conferences of ocean carriers.

ARGUMENT

Consequent to a painstaking and highly expert investigation of ocean shipping, the Congress 41 years ago enacted the Shipping Act, 1916. Its inquiry penetrated to the heart of the shipping business, and its report laid bare alike its evils and its needs. (H. Rept. No. 805, 63d Congress, 2d Sess. (1914), known as the Alexander Report.) For 40 years the evils condemned by the Congress in 1916 have been suppressed under the Act, while the needs of ocean shipping recognized by the Congress have been preserved. For 40 years the dual rate system, now in use by 62 conferences dealing with the foreign trade of the United States, has been a cornerstone in the stability of rates and services in ocean shipping.

We will demonstrate in this brief that the Board's power to approve the dual-rate system, which stems from Section 15 of the Act, is in no way abrogated or limited by Section 14, Third.

The Court below seems to accept on its merits the judgment of the Board that in proper cases "the dual rate system may be very potent in promoting stability and regularity of service and may be warranted by competitive considerations" (R. 242). It expressly ruled (R. 243).

> "Absent retaliation a preference or discriminatory rate is unlawful only if undue, unreasonable, unfair or unjust. Whether or not these characteristics exist depends upon the facts and circumstances of the case as found by the Board; and the courts will not substitute their judgment in this regard for that of the Board."

The Court below recognizes that its decision is compelled neither by precedent nor by the legislative history of the 1916 Act.

On what ground, then, does it undertake to strike down a basic operating method of the steamship indus-

try, sanctioned by more than a generation of decision and practice? On what ground does it declare that virtually every substantial shipping line has for a generation been violating the law, at a potential cost of a $25,000 fine for each offense? It is because the Court conceives that it has after 40 years discovered statutory words which—by its new reading—require this result.

Yet, as we shall show, this case does *not* present the familiar choice between the literal words of a statute and a sensible or the intended meaning. For the Court below has itself necessarily rejected the literal statutory words, and has added to those words ingredients designed to produce a rational result. We urge that a smaller, and less drastic, variation upon the statutory words would have reached a result which Congress plainly intended, a result which is necessary for the survival of the high-cost American merchant marine, and a result consistent with rather than contradictory of the decisions of this Court and the many decisions of the administrative tribunals which have from time to time been charged with the responsibility of interpreting and administering the Shipping Act, 1916. This we show in detail below.

I

THE HOLDING BELOW CONTRADICTS THE TEXT OF THE STATUTE

The Shipping Act, 1916, includes broad catch-all phrases at the end of one provision or another.[8] See-

[8] Examples are: (a) Section 14, Fourth, subjects the carrier to a fine of not more than $25,000 for every occasion when he should "unfairly treat * * * any shipper in the matter of * * * the adjustment and settlement of claims." In context it relates to things like discrimination based upon the volume of freight, and in fact no shipper has supposed that an indulgent Congress has given him so heavy a bludgeon in his negotiations with the claims

tion 14, Third, is probably the most extreme example. With paragraphing added for ready clarity, Section 14, Third, provides:

> "Sec. 14. That no common carrier by water shall, directly or indirectly * * * —
>
> * * * * * * *
>
> "Third.
> Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or
> resort to other discriminating or unfair methods,
> because such shipper
> has patronized any other carrier or
> has filed a complaint charging unfair treatment, or
> for any other reason."

If this section were read with the literalness which the respondents demand of this Court, it would make it unlawful for any common carrier by water to "resort to * * * discriminating * * * methods * * * for any * * * reason." This literal reading produces a flat and

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agents. (b) Section 15 requires that there be filed with the Board, for its approval, every written or oral agreement between carriers "in any manner providing for a * * * cooperative working arrangement." Read literally, Section 15 approval is required for every use of common facilities, every trade association activity, every jointly conducted litigation, and all of the day to day courtesies between freight traffic departments. (c) Section 18 requires "just and reasonable regulations and practices" relating to about a score of enumerated transportation activities, but nevertheless concludes with "all other matters relating to or connected with the receiving, handling, transporting, storing or delivering of property." (d) Section 20 forbids the disclosure of "any information concerning the nature, kind, quantity, destination, consignee, or routing of any property * * * which information * * * may be used to the detriment or prejudice of any carrier." The traffic data compiled, and disclosed to private parties, by the Maritime Administration and the Bureau of Census is often and properly used to the detriment of a carrier engaged in proceedings before the Board.

unqualified prohibition of *any* discrimination by a carrier for *any* reason.[9]

The liberal reading thus converts into unnecessary surplusage the following provisions of the Shipping Act: (a) Section 14, First, forbidding deferred rebates. (b) The remaining provisions of Section 14, Third, forbidding retaliation by refusing space accommodations to a shipper who has patronized another carrier. (c) Section 14, Fourth, forbidding various forms of discrimination based upon the volume of freight. (d) Section 16, First, forbidding undue or unreasonable preference, advantage, prejudice, or disadvantage. (e) Section 16, Second, forbidding transportation by any person at less than the regular rates. (f) Section 17 forbidding rates unjustly discriminatory between shippers.

The literal reading of Section 14, Third, would, in addition to making all of these provisions mere surplusage, convert much of Section 15 into an illusion. Where Section 15 purports to authorize agreements "giving or receiving special rates, accommodations, or other special privileges or advantages" or "providing for an exclusive, preferential, or cooperative working arrangement", and directs the Board to approve such agreements unless they are found to be "unjustly discriminatory or unfair" a literal reading of Section 14, Third, would make every such agreement unlawful and beyond the power of the Board to approve.

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[9] An alternative reading of the section is possible but involves an improbably awkward mixture of nouns and gerunds, i.e.:

> "Retaliate against any shipper by
> refusing, or threatening to refuse,
> space accommodations when
> such are available, or
> resort to other discriminating or
> unfair methods * * *"

A literal reading of Section 14, Third, is thus completely destructive of the heart of the Shipping Act; all of its major provisions would be either contradicted or converted into surplusage by an uncritical acceptance of the words of Section 14, Third, as they are written and without regard to what the Congress intended.

The Court below, did not accept a literal reading of Section 14, Third. It made a partial application of the rule of *ejusdem generis*, and went part way toward a sensible reading, by relating the prohibition against discriminating methods to retaliation (R. 242-244, 246),[10] and basing it on the patronage of another carrier (R. 242, 246). But the Court did not succeed in rationalizing the statute. For if Section 14, Third, as the Court below held, forbids *any* discrimination against a shipper for patronizing another carrier; then the Congress had no occasion whatever to enact in Section 14, First, its detailed description and prohibition of deferred rebates. These practices are incontestably included within Section 14, Third, as that section is

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[10] We do not consider it important that the Court of Appeals is plainly wrong in its understanding of "retaliation," since a literal reading of Section 14 alone reaches to the dual rate system, along with almost every other steamship practice, whether or not "retaliatory." But it may be noted that a decent respect for the dictionary shows that to retaliate is (e.g. Webster):

> To return the like for; to repay or requite in kind, as an injury; to put or inflict in return (upon) * * *

To deny space or shipping service to one who has patronized another is, as the Congress recognized, to "retaliate." To offer a lower rate for exclusive patronage is to induce, not to retaliate. This is made entirely clear by the fact that the shipper who has patronized the non-conference line has full benefit of the dual rate system when he signs the contract; he has been induced, not retaliated against.

construed by the Court below. That Court, by its revision of Section 14, Third, has managed to avoid most of the anomalies produced by a literal reading of its words. But it has not eliminated all; the Congress could not reasonably have enacted both Section 14, First, and Section 14, Third, as it is construed by the Court below. Its construction of the statute is accordingly, and at best, a suspect one.

We urge that the Court should carry the rule of *ejusdem generis* a hand's breadth farther than did the Court below and also relate Section 14, Third, to the refusal of space accommodations and related services necessary for the transport of goods. Such, as we show below, was the plain intention of the Committee which framed the bill. In short, Section 14, Third, is not a flat prohibition of *every* discrimination, making the bulk of the Act unnecessary or unenforceable. No more is it a flat prohibition against any form of discrimination based upon the use by the shipper of other carriers. If the retaliation and patronage clauses, notwithstanding the literal reading of the section, are to qualify the prohibitions of Section 14, Third; then by like token the space accommodations clause, notwithstanding a literal reading of the paragraph, must also qualify its prohibitions, if this reading is required to reconcile the evident intention of the Congress with the words it used.

The grammar of Section 14, Third, need not be revised so extensively as was done by the Court below. That Court was required, in order to make the statute fit its reading, to make the independent "or resort" clause over into a clause modified by the "retaliation" clause, and further to read it as modified by the patronage clause without regard to the "any other reason"

clause. In contrast, the statute makes sense with a much smaller departure from literalness. We urge only that "other" be read as "similar" in the second and the last clause.

This is a familiar, and indeed almost a standard, application of the rule of *ejusdem generis*.

> "The rule finds application and has frequently been applied where such terms as "other," "any other," "others," "or otherwise," or "other thing" follow an enumeration of particular classes, and where this occurs such words are to be read as "other such like," and are to be construed to include only others of like kind or character." (82 C.J.S., Statutes, sec. 332, p. 662; see also 50 Am. Jur., Statutes, sec. 249, p. 246)

Thus, this Court has unfailingly read the Mann Act, forbidding interstate transportation of "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose" as requiring a purpose similar in kind to prostitution or debauchery. *Cleveland* v. *United States*, 329 U. S. 14, 18 (polygamy); *Caminetti* v. *United States*, 242 U. S. 470, 487 (concubinage). A statute forbidding mergers by insurance companies, banking companies, savings banks, "or other corporations" does not apply to mergers by non-financial corporations. *Clarke* v. *Gold Dust Corporation*, 106 F. 2d 598, 602 (3 Cir. 1939). A statute taxing oil, gas, gasoline, and "other combustibles" does not apply to coal. *In re Bush Terminal Company*, 93 F. 2d 659 (2 Cir. 1938).

This simple, indeed routine, construction of the catch-all phrase "other" in Section 14, Third, not only eliminates all contradictions, surplusages and absurdities from the Shipping Act, it also brings the Section

into complete harmony with what Congress quite plainly intended to do.

II

THE INSISTENT ECONOMICS OF OCEAN SHIPPING

To determine the intention of the Congress it is as necessary now as in the day of Lord Coke to give heed to the conditions which the legislature sought to remedy! *Heydon's Case*, 3 Co. 7a, 76 Eng. Rep. 637 (1584); *Preston* v. *Browder*, 1 Wheat. 114, 121; *Holy Trinity Church* v. *United States*, 143 U.S. 457, 463; *United States* v. *Alpers*, 338 U. S. 680, 683-684. These conditions, in the case of the Shipping Act, are not speculative, but are precisely demonstrable both out of common knowledge and by what the authoritative report of the Congress spelled out.

It has been recognized for half a century and more that pure competition, however desirable it may be in other fields of economic activity, is far more detrimental than beneficial in the field of ocean shipping. Some form of control or restraint upon competition is necessary; and in the absence of some such control, it is the lesson of history that economically wasteful rate wars will result, with possibly chaotic effects. Shippers who operate on the basis of advance trading commitments cannot make such commitments if there is no rate stability (4 Alexander Report 296-298),[11] and carriers in such case can neither maintain regular service or maintain reserves necessary for fleet re-

[11] For an explanation of the advantages to shippers of stable rates, see Johnson, E.R. and Huebner, G.G., *Principles of Ocean Transportation*. (Appleton & Co., New York, 1918), pages 300-301.

placement and improvement (4 Alexander Report 295, 297).[12]

The Alexander Committee gave primary recognition to this fact and upon it premised its whole legislative approach to the problems of competition in ocean transportation:

> "*The entire history of steamship agreements shows that in ocean commerce there is no happy medium between war and peace when several lines engage in the same trade.* Most of the numerous agreements and conference arrangements discussed in the foregoing report were the outcome of rate wars, and represent a truce between the contending lines. To terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle they would consolidate through common ownership." (4 Alexander Report 416) (Emphasis added here, and in all other quotations herein.)

What was true in 1914 when the Congress considered the entire problem in formulating the Shipping Act is equally true today. Those forces which operate to cause mutually destructive rate wars and which are inherent in ocean shipping may be summarized as follows:

(1) The cost of carrying additional units of cargo on a vessel is extremely low. The cost of operating a vessel is substantially the same whether it goes out full

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[12] The effect of rate wars on the competing lines is explained, Johnson and Huebner, *op. cit.*, page 284. See also *North Atlantic Continental Freight Conference*, 4 F.M.B. — (1956), mimeo opinion, p. 14.

or half full. A vessel already committed to the voyage "profits" by filling otherwise empty space so long only as the rate exceeds the costs of loading and discharge. The result, where there is no effective restraint upon competition, is likely at every port to be a fierce and destructive struggle for cargo by reducing rates to the level which will fill the vessel.[13]

(2) Liner (i.e., berth or common carrier) steamship services operate on regular schedules between regular ports of call. It would often be preferable for such a service to cut its rates at a given port, rather than to abandon the port completely to its competition or to sail empty. In contrast to a railroad, which can dispatch to any particular point only the number of freight cars necessary, the whole of the liner must put in at each port.

(3) There is complete freedom of entry into trade upon the high seas. Every vessel of any flag is free at will to call at any port. As a result desirable trades tend to become overtonnaged. This is especially true where a temporary abundance of cargo brings into a trade new lines which fight to exist when traffic declines. In contrast, carriers in other comparable fields of transportation, surface or aerial, are permitted to enter a particular service only after authorization has been secured from a regulatory body.[14] See *North*

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[13] See Marx, Daniel Jr., *International Shipping Cartels* (Princeton University Press, 1953), pp. 21-22.

[14] The Transportation Act of 1920 made the initiation of new railroad service conditional upon a finding by the I.C.C. that the new service was required for the "public convenience and necessity." 49 U.S.C. 1(18). Upon enactment of regulatory authority over domestic motor and water carriage, in 1936 and 1940, re-

Atlantic Continental Freight Conference, 4 F.B.M. — (1956), mimeo opinion p. 16.

(4) The international nature of ocean foreign commerce makes it difficult or impossible for a single national authority to fix minimum rates, and thus to prevent rate wars.[15] In domestic commerce, regulatory bodies, like the Interstate Commerce Commission, have been vested with the power to fix minimum rates "to keep in competitive balance the various types of carriers and to prevent ruinous rate wars between them." *New York v. United States*, 331 U. S. 284, 346 (1947).

(5) There are great cost differences, both capital and operating, between the carriers of different nationalities (R. 56). In an overtonnaged market there is a great competitive advantage to carriers operating

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spectively, similar conditions were imposed upon new services in those fields of transportation. 49 U.S.C. 206, 49 U.S.C. 309. The Civil Aeronautics Act of 1938 made the initiation of new domestic or foreign air service conditional upon a finding of the C.A.B. that the new service provided by citizens of the United States was required for the "public convenience and necessity" or that the new service provided by non-citizens "will be in the public interest." 49 U.S.C. 481. No such controls exist in ocean foreign commerce.

[15] H. R. 10500, 64th Cong., 1st Sess., proposed a direct system of governmental regulation of foreign commerce whereby conferences would not be specifically recognized and an administrative board would be established with power "* * * to determine and prescribe just and reasonable rates or charges to be demanded or collected for the transportation of passengers and property * * *" and to issue licenses without which vessels could not engage in the foreign trade of the United States. Pages 516 to 521 of the hearings on the bill contain testimony outlining the objections to such a system of regulation, and the Alexander Committee concluded that ocean foreign commerce is not susceptible to direct rate control by any one national government. 4 Alexander Report 309-311, 420-421.

under flags where operating costs are low. Such carriers may still realize a profit even though they charge lower rates than carriers operating under other flags. This is a consideration of prime importance to those responsible for the welfare of the American merchant marine, since the operating costs of a U. S.-flag vessel are more than twice those of the next highest cost merchant marine. See *Review of Direct and Indirect Types of Maritime Subsidies*, U. S. Department of Commerce, April 1956, p. 20.

(6) In many trades, the outbound cargoes from the United States are much greater than those inbound. The fleet necessary to carry the outbound traffic will inevitably overtonnage the inbound trade. *Trans-Pacific Freight Conference of Japan*, 4 F.M.B. —, served March 5, 1956, mimeo opinion, p. 6.

These factors necessitate the establishment of some restraint upon competition between carriers. By Section 15 of the Act, Congress evidenced its endorsement of this principle, and, as recommended by the Alexander Committee, it thereby permitted carriers to join in conferences for the purpose of controlling competition. An effective conference operating under the provisions of the Act can normally prevent the outbreak of rate wars, by providing a forum, as it were, in which the carriers in the trade can agree upon a single tariff which will prove acceptable to the shippers and to which all lines will adhere. When, however, a trade becomes overtonnaged and a strong independent line exists, the nature of ocean shipping will often make it impossible for the conference to control rates merely by agreement among themselves. By undercutting by a fixed percentage the rates adhered to by conferences lines, the

independent line can divert substantial quantities of traffic away from the conference lines, can fill its vessels to a much greater degree, and can thereby comparatively reduce its carrying cost per ton. See Marx, Daniel Jr., *op. cit.*, p. 196.

Thus, the uniformity of the conference's rate enables an independent to operate profitably, and ordinarily more profitably than the conference lines, despite its lower rates. Once the conference members are seriously hurt by the independent's rate-cutting, the conference is strongly impelled to abandon its rate structure and to declare rates "open"—i.e., to permit each of the members to fix its own rates independently. All lines, including the independent, are then placed in a position of unrestrained competition, and low operating costs become the main index of ability to survive. In a situation of this sort, American-flag lines are by far the most vulnerable, for ship operating and construction costs under United States registry are, and historically have been, materially higher than under any other.[16] Moreover, shippers are injuriously affected, because, as in the instant case, the instability of rates and service makes forward trading risky. The advan-

[16] "It must be clearly recognized that the conference system has assisted in the establishment of an American merchant marine where before it had little chance of survival. * * * The rates have been set high enough to allow the American operator to at least meet his out-of-pocket costs of operation, and while the foreign operator has many advantages, not the least of which is greater profits on his operation, the fact remains that from the standpoint of national security and from the point of view of the American shipper, the conference system has paid off in stability of rates and improved quality of service." Report of the Magnuson Subcommittee of the Senate Committee on Interstate and Foreign Commerce (S. Rept. No. 2494, 81st Cong., 2d Sess., at page 86, August 30, 1950).

tage of having a low, but variable ocean rate, is ought weighed by the advantage of having a stable, even though somewhat higher, rate.[17] Such is the testimony of the shippers in this case, and such was the finding of the Board (R. 32, 33-34).

The economic damage to the independent line, such as Isbrandtsen, which results from a rate war, may be far greater than that which results from the dual rate system. The Board, in its review of proposed dual rate systems as prescribed in Section 15, can regulate the differential or spread of rates to an amount that will minimize the harmful effect on the independent and at the same time prevent the disastrous effect of rate wars on *all* the carriers.[18] Here, Isbrandtsen has

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[17] The Alexander Report states:

"Moreover, as has been repeatedly pointed out in this volume, shippers require, above all else, a regular service * * *" (4 Alexander Report 288).

[18] In the instant case, the Board held:

"The spread between contract and non-contract rates in the proposed system, based in part on the percentage by which Isbrandtsen most frequently underquotes conference tariff rates will reasonably enable the conference to meet Isbrandtsen's competition *without*, as in the method of uniform conference rate reduction preferred by Isbrandtsen, eliminating a *single* American carrier from the trade.

"While Isbrandtsen's share of the traffic may, as stated, be reduced, we do not anticipate that such increase in conference controlled traffic will result in the traditional evils associated with monopoly. The continued participation of Isbrandtsen in the trade, as well as the existence of strong shipper organizations, stand as a strong deterrent against exorbitant freight rates and other objectionable monopolistic practices. In any event this Board has full power over those rates of conference carriers in foreign commerce which are detrimental to the commerce of the United States" (R. 64-65; Emphasis the Board's).

been practically eliminated from the trade as a result of the rate war. Under the dual rate system, Isbrandtsen would probably carry approximately 10 percent or more of the cargo moving in the trade, which favorably compares with the expected average of the conference lines (R. 31, 62).

The dual rate system enables a conference to meet the competition of independent lines, without resorting to a costly and wasteful rate war.[19] Where the Board finds that grave instability exists, it may properly conclude that the danger to shippers and carriers justifies the introduction of a dual rate system, notwithstanding the force of its restraint upon competition. Absent the finding of grave instability, the Board does not consider the system justified, and it will not permit its use.[20]

In the instant case, the Board found that the Japan/Atlantic trade was overtonnaged; that the independent Isbrandtsen had been setting its rates at a fixed percentage below those of the Conference; that an injurious rate war was prevalent in the trade following the opening of rates; that many shippers had sought

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[19] As we shall show, the dual rate system, and other substantially similar contract systems, were widely used in the foreign commerce of the United States at the time of the Alexander Committee's investigation. At the present time, the dual rate system is employed by 62 conferences. It is, therefore, and has long been, a common, rather than an extraordinary, feature in American foreign trade.

[20] *Trans-Pacific Freight Conference of Japan*, 4 F.M.B. — (1956); also see: *Japan-Atlantic and Gulf Freight Conference*, 4 F.M.B. — (1955) (which is here under review); *North Atlantic Continental Freight Conference*, 4 F.M.B. — (1956).

Other safeguards which must exist before the use of a dual rate system will be approved are mentioned below at p. 71.

the restoration of a conference tariff; and that the resulting condition of grave instability had adversely affected the smooth flow of Japanese-American trade, the value of inventories of Japanese goods in the United States, and the ability of merchants to conduct business on the customary basis of advance commitments. Based on these findings, and in the light of its expert judgment in ocean shipping matters, the Board properly concluded that the instability in the trade justified the introduction of the dual rate system. The rationale of the action followed the doctrine set forth by this Court in *Swayne & Hoyt* v. *United States*, 300 U. S. 297, 304 (1937), in another dual rate case:

> "In determining whether the present discrimination was undue or unreasonable the Secretary [the Board's predecessor] was called upon to ascertain whether its effect was to exclude other carriers from the traffic, and if so, whether, as appellants urge, it operated to secure stability of rates with consequent stability of service, and, so far as either effect was found to ensue, to weigh the disadvantages of the former against the advantages of the latter."

III

THE LEGISLATIVE HISTORY OF THE ACT DEMONSTRATES THAT CONGRESS DID NOT INTEND TO PROHIBIT THE DUAL RATE SYSTEM

The Congress, as we shall show in this section, was both aware of and sensitive to the critical needs of the ocean shipping industry. The history which follows leaves it in our view indisputable that the Congress (a) recognized the existence of the dual rate system, but (b) in contrast to more objectionable practices did not condemn it, and instead (c) left it to the Board to approve or disapprove according as the impact of a particular

arrangement might be unfair, unjust or unduly discriminatory.

The Congressional intention is written plain in the massive report of the House Committee on Merchant Marine and Fisheries, consequent to its detailed investigation of the ocean shipping industry. (H. Doc. 805, 63d Cong., 2d Sess., known as the Alexander Report.) The Shipping Act, 1916, grew out of this report and reflected its recommendations.[21]

We note at the outset that, on this critical issue of Congressional intention, the two opinions of the Court of Appeals are fundamentally inconsistent, even though all three judges concurred in both. The principal opinion, written by Judge Fahy, pays little or no attention to the legislative history. It does no more than to concede that the Court considered the legislative history and found no indication therein of an explicit intention to outlaw the dual rate system (R. 244-245), but it holds flatly that, "Since the dual-rate system here constitutes retaliation it must be condemned without regard to the question of its reasonableness, as are deferred rebates" (R. 243).

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[21] The Alexander report was prepared by the House Committee on the Merchant Marine and Fisheries pursuant to resolutions in the 62nd Congress (H. Res. 425, 587) and the 63rd Congress (H. Res. 205), and was submitted during the 63rd Congress in 1914 (H. Doc. 805, 63rd Cong., 2nd Sess.). A bill largely carrying out the recommendations of the Report was introduced (H. R. 17328), but not passed. In the 64th Congress the bill was reintroduced in substantially the same form (H. R. 15455, 64th Cong., 1st Sess.) and the report of the Committee recommending the bill quoted verbatim the recommendations of the Alexander report and stated that the bill had been framed in large part on the basis of its recommendations. H. Rept. 659, 64th Cong., 1st Sess., 27. The Senate Committee also adopted the recommendations of the Alexander report. S. Rept. 689, 64th Cong., 1st Sess.

In contrast, the concurring opinion, written by Judge Washington, does attempt to deal with the legislative history. It rejects the Board's arguments as to legislative intent on the ground that the dual rate contracts considered by the Alexander Committee and given "implied congressional approval" (R. 247) were "requirements contracts" which provided the buyer a "guarantee of supply and guarantee of no rate increase . . . . " (R. 247). In attempting to distinguish two types of dual rate contracts, Judge Washington reaches a conclusion at variance with the conclusion in Judge Fahy's opinion that all dual rate contracts are illegal. The one opinion would bar any dual rate system; the other would permit such a system if it embodied a "requirements contract." The one opinion held the dual rate system illegal *per se*; the other only because the contract here involved did not seem to the judges below to be a "requirements contract" as they understood the term.

As we shall show, this supposed distinction relied on in the Washington opinion is fallacious, as the 1913 contracts and the contracts in the instant case are not significantly different. Moreover, the 1913 contracts included the very same elements which the principal opinions below found to be the illegal retaliation inherent in dual rate contracts.

A. The Alexander Committee Described and Absolutely Condemned Certain Specific Carrier Practices, But Not the Dual Rate System.

The Alexander Committee heard considerable testimony relating, *inter alia*, to "the unfairness of *certain* methods—such as fighting ships, deferred rebates, and threats to refuse shipping accommodations—used by some conference lines to meet the competition of non-

conference lines." 4 Alexander Report 417. In the fourth volume of the Report, the Committee set forth a "Summary of Conferences and Agreements," in which it recapitulated the evidence that it had accumulated; and at 4 Alexander Report 287-293, the Committee described the practices then used by conferences for the purpose of "Meeting the competition of lines outside of the conference."

The first two practices described were deferred rebates and fighting ships. These were condemned by the Committee and it went on to recommend "That the use of 'fighting ships' and deferred rebates be prohibited in both the export and import trade of the United States." 4 Alexander Report 421. The next practices described were (p. 290):

"3. Contracts with shippers which may be classified as:

> "(a) Joint contracts made by the conference as a whole.—Such contracts are made for the amount of all the lines in the agreement, each carrying its proportion of the contract freight as tendered from time to time. The contracting lines agree to furnish steamers at regular intervals and *the shipper agrees to confine all shipments to conference steamers*, and to announce the quantity of cargo to be shipped in ample time to allow for the proper supply of tonnage. *The rates on such contracts are less than those specified in the regular tariff, but the lines generally pursue a policy of giving the small shipper the same contract rates as the large shippers, i.e., are willing at all times to contract with all shippers on the same terms.*[22]

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[22] Under the similar dual rate contract involved in the instant case, the shipper promises to patronize exclusively the vessels of the Conference lines and the carriers collectively undertake

"(b) Contracts made by the individual members of the conference, which are open to small and large shippers alike, irrespective of the size of the shipment. * * * The shipper agrees to give the steamship line his *entire* shipments to certain designated ports during a definite period, and the line obligates itself to provide tonnage at definitely prescribed rates for all shipments offered, provided reasonable notice of intention to ship is given * * *. If the line reduces its rates to any other shipper during the period of the agreement it is usually provided that the shipper with whom the contract was made should be given the benefit of all such reductions during the period that the lower rates remain in force. * * *

"(c) Contracts with large shippers either for all their freight or for certain important articles forming the main basis in a given trade, *at lower rates than those charged on similar goods, if shipped in small quantities.* * * *"[23]

The Committee also enumerated another method of "Meeting the competition of lines outside of the conference" consisting of preferential agreements between domestic railroads and ocean lines with respect to use of docks, furnishing of freight, etc. 4 Alexander Report 292. The Committee recommended policing of such railroad activity by the Interstate Commerce Commission, 4 Alexander Report 423-424, and accordingly, no

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to maintain a shipping service adequate to meet the reasonable requirements of the trade and to carry the contracting shipper's cargoes "at the contract [lower] rates set out in the tariff . . ." (R. 203-204).

[23] Contracts based upon volume of shipment were outlawed by Section 14, Fourth, of the Act, where they were "unfair or unjustly discriminatory" with respect to small shippers.

legislation on this subject matter was embodied in the Shipping Act.

It is manifest that the above practice 3(a), described by the Committee as "Joint contracts made by the conference as a whole", precisely comports with the dual rate system here approved by the Board, encompassing the identical features of discount rates and exclusive patronage.[24] Moreover, unlike the Committee's description of deferred rebates and fighting ships, this description is entirely free of any hint of condemnation. On the contrary, these contracts are described with approbation as "giving the small shipper the same contract rates as large shippers, i.e., are willing to contract with all shippers on the same terms." This is a significant feature of the dual rate system, for the Committee subsequently recommended, 4 Alexander Report 421, and Congress enacted (in Section 14, Fourth) a prohibition against contracts which are unfair or unjustly discriminatory in respect of small shippers.

In the subsequent enactment of Section 14, Congress precisely described and in absolute terms condemned the "deferred rebate" and "fighting ship", as those practices were described and condemned by the Committee. The contract rate system was also precisely described, but not condemned, by the Committee. Significantly, this practice was not mentioned or described in the statute. Had Congress intended absolutely to condemn the contract rate system (as the Court below has erroneously held), it would surely have described this method as it did the deferred rebate

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[24] The following section of this brief will discuss in detail the shipper contracts reported in the Alexander Report.

and fighting ships, and expressly prohibited it. *But the contract rate system was not so prohibited*, nor was any such prohibition intended, even implicitly, in Section 14, Third.

This conclusion is more than surmise. It is compelled by an analysis of the rationale expressed in the Committee's discussion of the methods used by conferences in meeting non-conference competition.

In describing deferred rebates, the Committee emphasized that (4 Alexander Report 287):

> "Since the time of payment of the rebate follows the period for which it is computed, the shipper, if he desires to obtain the rebate, *is under constant obligations to the conference lines*, and is prevented from patronizing any other service since that act would mean the forfeiture of all accumulated rebates."

The Committee went on to point out (4 Alexander Report 307):

> "That deferred rebate systems are objectionable and should be prohibited for the following reasons:
>
> "(1) By deferring the payment of the rebate until three or six months following the period to which the rebate applies ship owners effectively tie the merchants to a group of lines *for successive periods. In this connection it is argued that the ordinary contract system does not place the shipper in the position of continual dependence that results from the deferred rebate system.*"

The feature of the deferred rebate system which outraged the Committee was its placing of shippers in *continual dependence*. Section 14, First, was so phrased as to make absolute the prohibition against this feature. *It is most significant that the Committee*

here took pains to distinguish this condemned system from the "ordinary contract system," which "does not place the shippers in the position of continual dependence."[25]

A similarly vital distinction was made when the Committee turned its attention to volume discount contracts, later prohibited by Section 14, Fourth. These were described as "Contracts with large shippers either for all their freight or for certain important articles forming the main basis in a given trade, at lower rates than those charged on similar goods, if shipped in small quantities." 4 Alexander Report 291. The vice of these contracts lay in the fact that they were available only to large shippers, and the lower rate would attach to all shipments, *large or small,* made by such shippers. Thus, even a small shipment would move at a lower rate than a similar shipment by another shipper unable to offer a volume movement. 4 Alexander Report 186-187, 219-221, 291-292.

It was this feature of the volume discount system—*its unavailability to small shippers*—that offended the Committee and led to its condemnation. Again the Committee considered it relevant to note that the offensive feature of the volume contracts was absent from "the ordinary contract system"—the dual rate system—which gave "the small shipper the same contract rates as the large shippers." 4 Alexander Report 290.

It is therefore beyond doubt that the Committee held the dual rate system acceptable. It described the system, and two others somewhat similar to it (deferred rebates and volume discounts) in unmistakably clear

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[25] The Committee's distinction between deferred rebates and the dual rate system was recognized by the Supreme Court in *Swayne & Hoyt, Ltd.* v. *United States,* 300 U.S. 297, 307, n. 3 (1937), quoted at p. 65, *infra.*

terms, and condemned the latter, while its description of the former is free of any hint of disapproval. It expressly called attention to the vice in each of the condemned systems, and took pains to point out that those vices did not inhere in the dual rate system. Unlike the deferred rebate system, said the Committee, "the ordinary contract system does not place the shipper in the position of continual dependence that results from the deferred rebated system"; and unlike the volume discount system, the dual rate system "[gives] the small shipper the same contract rates as the large shippers." (4 Alexander Report 290, 307).[26]

The distinctions between the ordinary contract rate system, on the one hand, and the deferred rebate and

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[26] In 1918, Professor Emory R. Johnson, who, in the words of Chairman Alexander, gave the Committee the "benefit of [his] advice and service in framing" bills leading to the Shipping Act, 1916 (Hearings on H. R. 14337, 64th Cong., 1st sess., p. 10), and Professor Grover G. Huebner, published *Principles of Ocean Transportation*, on pp. 298-299 of which they discussed "Methods of Controlling Competition of Non-Conference Lines." They first described deferred rebates and stated "The system is now illegal under the Shipping Act of September, 1916 . . ." Next they described the use of fighting ships which they stated "is also prohibited by the Shipping Act of September, 1916." The third and last method they describe, but which they do not intimate is prohibited in every case by the Shipping Act, is as follows:

> "Conference lines, either individually or as a group, may also make contracts with shippers, whereby in return for reduced rates and an agreed service the shippers agree to dispatch via the conference lines their entire shipments to certain ports during agreed periods. The privilege of securing such contracts is usually open to all shippers alike, but has at times been a source of discrimination. Contracts have been made with large shippers for all or a part of their freight at lower rates than those quoted on smaller quantities of similar commodities. The Shipping Act, however, prohibits unfair discriminations in the future. * * *"

volume contract system, on the other, were of central, rather than peripheral, importance in not only the Committee's thinking, but also in the structure of the ensuing legislation.

Section 14, First, which outlaws deferred rebates, defines that practice in the most precise terms. Section 14, Third, which the Court below construed as a prohibition of the dual rate system, contains no reference to rates or contracts and no such precise definition of retaliation; on the contrary, it speaks in such general terms as "resort to other discriminating or unfair methods" because a shipper has patronized another carrier "or for any other reason." It is clear that, if the general language of Section 14, Third, condemns the dual rate system, it must *a fortiori* condemn the far more restrictive and retaliatory deferred rebate system and there would have been no need whatsoever for the enactment of Section 14, First. The excessively broad construction placed by the Court below on Section 14, Third, makes Section 14, First, wholly superfluous, and it obliterates the fact, important in the Alexander Committee's deliberations, that the "ordinary contract system does not place the shipper in the position of continual dependence that results from the deferred rebate system" 4 Alexander Report 307.

B. The Dual Rate Contract Found by the Court of Appeals to be Illegal *Per Se* Is Not Significantly Different From the Contracts Implicitly Approved by the Alexander Committee.

The failure of the Alexander Committee to recommend, and of the Congress to enact, a specific prohibition against use of the dual rate system cannot be ascribed to the asserted fact that the system was unknown when the Act was under legislative considera-

tion. Contrary to the assertion in the concurring opinion of Judge Washington of the Court below, contract rate systems were in wide use prior to the enactment of the Act. Such systems were well known to the Alexander Committee, and they differed in no material respect from the system proposed in the instant case by petitioner Japan Atlantic and Gulf Freight Conference, or those presently used in many other trades.

Numerous examples of contract rate systems were reported to the Alexander Committee and it summarized this carrier practice as follows—a definition on all fours with present-day dual rate systems:

> "(a) *Joint contracts made by the conference as a whole.*—Such contracts are made for the account of all the lines in the agreement, each carrying its proportion of the contract freight as tendered from time to time. The contracting lines agree to furnish steamers at regular intervals and the shipper agrees to confine all shipments to conference steamers, and to announce the quantity of cargo to be shipped in ample time to allow for the proper supply of tonnage. The rates on such contracts are less than those specified in the regular tariff, but the lines generally pursue a policy of giving the small shipper the same contract rates as the large shippers, i.e. are willing at all times to contract with all shippers on the same terms." 4 Alexander Report 290.

The Committee's investigation brought to its attention many contract rate systems of this type. A sample of such contracts, in pertinent part, is as follows (1 Alexander Report 248):

"New York, January 21, 1910

"Messrs. Guinle & Co.,
New York City.

"Dear Sirs: We hereby beg to confirm freight agreement made with you by us, acting for the Prince Line, Lamport & Holt Line, and Hamburg-South American Steamship Co., and Hamburg-American Line (joint service). This agreement to cover the transportation of your entire shipments of lawful merchandise from New York to ports in Brazil named below, on the following terms:

"For Pernambuco, Rio de Janeiro, and Santos: Electrical and other machinery (electrical fittings), $7 per ton, weight or measurement, ship's option; transmission towers (structural material), $6 per ton, weight or measurement, ship's option; curved plates $6 per ton . . .; car material, $6 per ton . . .; paint and varnish, $7.50 per ton . . .; copper wire, $7.50 per ton . . .; lubricating oil, 15 cents per cubic foot-landed.

* * * * *

"The steamship lines agree to provide space on receipt of ample notice of your requirements by streamers of the Prince Line, Lamport & Holt Line and Hamburg-South American Steamship Co., and Hamburg-American Line (joint service).

* * * * *

"This contract to run during the current month and the three following months and to run thereafter subject to 30 days' notice of withdrawal on the part of either party, but such notice not to be given before April 1, 1910.

Yours faithfully,
Paul F. Gerhard & Co.
General Agents

Accepted:
Guinle & Co."

Similar contracts at the same rates were offered to all shippers in the trade, large or small. The contract rates were lower than the rates charged non-contract shippers (1 Alexander Report 264).

The report to the Committee from the United States Consul General at Rotterdam, Netherlands,[27] includes a letter from a shipper describing "the terms on which we ship goods to the United States." The letter, in part, states (3 Alexander Report 90):

> "The Holland-American Line has an agreement with the principal Belgian, English, Canadian, and German steamship companies, constituting the North Atlantic pool or steamship conference on the understanding of mutual support and uniform ocean freights, and their method under this agreement is to publish a tariff of freights from European to American ports on equal basis, whether payable at the ports of shipment or of destination, *but they are granting special lower freights on same basis of payment to those contracting shippers or consignees who for the running year or season promise in writing, that they will ship all their goods, or will have these shipped, by the steamers of the conference lines. No rebates are allowed to anyone.* Contracting firms will be at liberty to use non-conference steamers, when American consignees, paying the freight, wish them to do so, and in the latter case such shipments will not be deemed a deviation from the contract, and such shippers will continually

[27] The Alexander Committee, through the cooperation of the Department of State, received reports from diplomatic and consular officers of the United States in foreign countries. These reports constitute Volume 3 of the Alexander Report.

enjoy for the time named the lower freights stipulated therein."[28]

In those cases where rate contracts were made with shippers by individual conference members, the practice was for all practical purposes the same as if the contracts were made jointly by the conference, since the conference would set the contract rates for its members as well as the tariff rates (1 Alexander Report 98).

The Court of Appeals erroneously believed that there were material distinctions between the contracts examined by the Alexander Committee which the Court calls "requirements contracts", and the dual rate contract now before the Board (R. 247).

> "But the fact is that the contracts examined by the Alexander Committee in 1913 were materially different from the contracts before us now. The 1913 contracts were bona fide requirements contracts. The sellers (carriers) undertook a firm obligation to provide space; both parties undertook firm obligations as to the price. And since the price was fixed for the term of the contract (usually six months) the price figure in the contract represented a hedge on the part of both parties against fluctuations in rates. In the contracts in suit the carriers' commitment as to space is

[28] It must be emphasized that the system herein described does not cover f.o.b. or f.a.s. shipments (in which the consignee, and not the consignor, pays the freight and controls the routing). The Board's decision in the instant case, in like fashion, excludes such shipments from the coverage of the system; that is, the contract permits a consignee to nominate a non-conference vessel. The system described in the letter, and that presently before this Court, are remarkably similar in this, as in every other material feature.

> almost illusory, being a commitment to carry 'so far as regular services are available.' The price aspect of the contract is in terms subject to increases. Thus, the two principal considerations normally given to a buyer (the shipper) under a requirements contract-guarantee of supply and guarantee of no rate increase—are here lacking * * *" (Court's footnotes omitted).[29]

Here the Court of Appeals is plainly in error. The contracts implicitly approved by the Alexander Committee and the contracts in the instant proceeding are not materially different in any feature relevant to this case. As noted in the Committee's description of "Joint contracts made by the conference as a whole," the shipper of 1913, exactly as does the shipper of today, agreed to confine *all* shipments to conference vessels and in return received a lower rate than non-contract shippers. These features—the promise of exclusive patronage and the entitlement in return to a discount rate—are the essential features, and they are no different in today's contracts. The Court of Appeals, in its principal opinion held that the dual rate contracts in every case constitute retaliation because they provide for liquidated damages and because the non-contracting shipper is required to pay a higher rate. The Court failed to see what is apparent: that the so-called "requirements contracts" would themselves be equally retaliatory; for (a) if they had the

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[29] Yet the Court concedes in footnote 8, p. 14, of its opinion that "In most of these contracts the price term was fixed as against increases, but shippers were entitled to any decreases in the regular tariffs." In this respect, they did not represent "a hedge on the part of both parties against fluctuations in rates," as erroneously stated in the concurring opinion below.

force of contracts at all, they imposed upon contracting shippers an obligation to pay damages (whether or not liquidated in the contract is immaterial) for a breach, and (b) as in the presently proposed system, non-contracting shippers were required to pay higher rates. In purpose and in effect, the 1913 contracts and the dual rate contracts of today are exactly the same—to provide a contract system less harsh than the deferred rebate system believed by the carriers in 1913 to be illegal under the anti-trust laws in the outbound trades from the United States,[30] and now explicitly condemned by Section 14, First.

Although the 1913 contracts were not in every detail similar to the dual rate contract at bar, the points of difference are not in any way material. These points are:

1. The 1913 contracts fixed prices for different classes of freight for the term of the contract—usually six months (R. 247), but sometimes, as in the New York/Brazil agreement quoted above, only for three and a fraction months. The contracts in the instant case provide that "Increases shall not become effective until the expiration of the calendar month during which notice is given and of the two calendar months next following. * * * Should the Carriers during the period of this Agreement reduce rates on any commodity on which contract rates are applicable, the Shipper shall be given the full benefit of such reduced rates * * *"

[30] 1 Alexander Report 154-155; 4 Alexander Report 288-289. The lines were of the opinion that rebates were not illegal in the inbound trades because the United States had no jurisdiction if arrangements were made abroad and rebates paid at a foreign port. They therefor used the deferred rebate system extensively in the trades to the United States.

(R. 203). Thus, the price provisions in the 1913 contracts differ only as to the period (two to three months as compared with six months) during which the price guarantees are to last.[31] Certainly this is not a material difference, sufficient to make one contract legal and the other *per se* illegal. It would be a simple matter for the shipper agreements in the instant case to be amended to provide a six-month price guarantee, were legality to depend upon it, but the result would be the elevation of form above substance.

2. The 1913 contracts were said by the Court of Appeals to provide space guarantees for all the shippers' cargo whereas it considered that the current contracts do not. This difference if it exists, is wholly immaterial to this case. The dual rate system is a defensive weapon permitted by the Board only where rate-cutting non-conference lines make serious inroads upon conference carryings, i.e., leaves conference lines with substantial unused space.[32] In such a situation, the last thing the shipper needs, or the carriers have to be contractually compelled to provide, is a space guarantee. In the present trade there are 300 sailings per year by vessels each of which has empty space. (R. 27). To make a feature as inconsequential as a space guar-

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[31] However, the Guinle & Co. contract quoted *supra*, p. 44, provided for an initial term of 3 months, following which the contract is terminable at the instance of either party on 30 days' notice. Thus, if the carriers wanted to raise rates, they could do so by the mere expedient of terminating the contracts and tendering new contracts at the higher rate.

[32] See Board decisions in *Japan-Atlantic and Gulf Freight Conference*, 4 F.M.B. — (1955); *North Atlantic Continental Freight Conference*, 4 F.M.B. — (1956); *Trans-Pacific Freight Conference of Japan*, 4 F.M.B. — (1956).

anty in an overtonnaged trade the touchstone of legality is to abandon realty.[33]

In short, the differences, such as they are, are illusory; in the material and operative features, the 1913 contracts and those of today are identical, both calling for a promise of exclusive patronage and for a discount rate in return for that promise.

C. The Alexander Committee Had Clear Notice That the Contract Rate System Would be Widely Used in Place of Deferred Rebates.

Various statements before the Alexander Committee made it absolutely clear to the Committee that if deferred rebates were outlawed the system of contract

[33] The dual rate contracts in the instant case provide that the Conference carriers "undertake to maintain a shipping service adequate to meet the reasonable requirements" of the trade and that if the Conference carriers cannot provide space, upon due notice, the shipper may book his cargo on a non-conference carrier (R. 204). In *Far East Conference* v. *United States*, 342 U.S. 570, 572 (1952), the Supreme Court's description of the dual rate agreement there in issue shows its similarity to the "requirements contracts" impliedly held lawful in the Judge Washington opinion: "The Conference members, however, were obligated to supply facilities sufficient to handle freight destined for the Far East." The contract in the *Far East* case provides no greater guarantee of space than the dual rate contract here in issue. The pertinent provision of the *Far East* contract is as follows:

> "If the carriers fail to furnish space after the Shipper duly applies therefor, the Shipper shall be free with respect to such shipment to secure space elsewhere without prejudice to his right to future shipments under this agreement provided the Shipper first notifies the office of the Far East Conference at New York and allows the Conference Secretary forty-eight hours from receipt of such notice to confirm that said space is not available." See Transcript of Record in the *Far East* case, p. 18.

rates would be extended to cover shipments in those trades.

The concern with shipping matters—particularly the practices of conferences—that gave rise to the Alexander Committee's investigation, was not local to the United States. In 1909, in Great Britain, the Royal Commission on Shipping Rings[34] brought to completion an investigation much like that of the Alexander Committee, and The Report of the Royal Commission was thoroughly studied by the American Committee,[35] which reprinted the parts of the Royal Commission Report here discussed.[36] One of the principal areas of inquiry of the Royal Commission was "whether shipping conferences can effectively exist without some tie upon the shipper either in the form of the system of deferred rebates, *or in some other form.*" 1 Alexander Report 378-379. In answering this inquiry, the Royal Commission commented on the contract rate system as follows (1 Alexander Report 380-381):

> "The only tie brought to our notice in the evidence which in our opinion would at the present day be effective both in binding the shippers and insuring all the advantages of the conference system in the degree in which they are now given is the deferred rebate. *In certain trades and with regard to certain commodites the support of shippers has been obtained by a system of contracts.*

[34] Conferences were commonly called shipping rings in Great Britain.

[35] 1 Alexander Report 267, 369, 711; 4 Alexander Report 4, 100.

[36] Part of the Royal Commission Report is embodied in the Alexander Report, Volume 1, pages 369-381. Citations to the Royal Commission Report are stated herein in terms of the pages of the Alexander Report at which they may be found.

The only advantage urged on behalf of this system, an advantage probably greater in theory than in practice, is that the contract is terminable at a certain date and the shipper is left free to make new arrangements without any such loss as is involved in the case of a rebate. On the other hand, it is open to certain objections. In the first place, to form an effective tie the contract must be for a long period. Secondly, as an alternative to the system of deferred rebates, the contract system does not appear to be uniformly applicable to all shippers in a large and general trade. In those trades in which it is used it is generally confined to one particular commodity, and in every case the shippers are comparatively few in number and well known. There is therefore no difficulty in finding them, and, when their support has been secured by contract, the shipowners have thereby obtained a guarantee of the bulk of the trade. In a large general trade, on the other hand, the shippers are many in number, and they vary from year to year and from month to month. A system of contracts therefore, in a trade of this character, would probably take the form of the *system which existed before the introduction of the rebate system. The shipowners, that is to say, would make contracts at low rates of freight with the large merchants who were known to them, and the small and casual shipper would have to pay a higher rate.* This is in fact the system which *now* [1909] exists in the export trade of the United States."[37]

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[37] By recommending the prohibition of contracts unfairly based on volume (enacted later in Section 14, Fourth), the Alexander Committee insured that the contract systems henceforth used would not have this objectionable feature.

The Royal Commission concluded that (1 Alexander Report 381):

> "Our opinion on the whole matter may be summarized as follows:
>
> "1. The advantages conferred by Shipping Conferences are substantially dependent upon the system of deferred rebates, or some system equally effective as a 'tie' upon the shippers and equally uniform in its application.
>
> "2. *If the rebate system were abolished, shipowners would endeavor to secure the custom of shippers by making contracts with them covering long periods.*
>
> "3. The contract system would in large general trades lead to the making of preferential contracts with large [shippers] at the expense of small shippers."

The Alexander Committee was aware of the Royal Commission's conclusion that a contract system would replace the deferred rebate system if the latter were outlawed, and it took pains to circumscribe its recommended prohibition of the deferred rebate in terms that did not preclude the contract rate system. It also took pains to insure that the contract system would be made available to *all* shippers by recommending that unfair volume requirements be outlawed (4 Alexander Report 421). The Committee must, therefore, have deemed lawful a contract system, such as "joint contracts made by the conference as a whole" where the carriers are "willing at all times to con-

tract with all shippers on the same terms" (4 Alexander Report 290).

This was not the only warning received by the Alexander Committee that deferred rebates, if outlawed, would be succeeded by a contract rate system. A "committee appointed by the representatives of steamship lines maintaining established services from New York to foreign countries"—the major carriers in the foreign trade of the United States at that time—reported to the Alexander Committee[38] that (2 Alexander Report 1369):

> "The alternative to the deferred-rebate system in trades where the return cargoes are insufficient to fill the ships required for the outward voyages is the long-term contract. *It is universally recognized that one or the other of these methods of insuring a continued patronage of the regular lines is necessary to justify the operation of such lines.*"

This, the Alexander Committee must have anticipated that a contract rate system would replace the deferred rebate system. Nowhere does the Committee indicate the intention to condemn this practice absolutely, although the lawmakers were familiar with it, and, moreover, knew that it probably would be widely used.

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[38] The Alexander Committee in its summary of Conference practices referred the readers to this report of the New York carriers (4 Alexander Report 295).

D. The "Retaliation" Condemned by the Act Relates to Retaliatory Denial of Service, and Not to Any System of Monetary Discount or Penalty, Such as the Contract Rate System.

From the foregoing, we believe that there can be no real doubt that the Alexander Committee was familiar with the contract rate system in a form identical in every material respect with that *sub judice*, and that moreover, it knew that the system would be even more widely used following the condemnation of the deferred rebate. Nonetheless, the Committee's recommendations were specific in their condemnation only of deferred rebates, and unfair volume contracts, and, what is more important, the Committee's references to these offensive practices were expressly hedged with the comment that the objectionable features thereof did *not* inhere in the contract rate system (4 Alexander Report 307).

In the light of this evidence to the contrary, it can scarcely be said that Section 14, Third, was designed to prohibit the dual rate system by way of its prohibition of retaliation. Such a result is at best improbable, when it is considered that such a reading of Section 14, Third, strips Section 14, First, of all effect, for the condemnation of the contract rate system as retaliatory would make wholly unnecessary the express and specific condemnation of the deferred rebate.

What, then, was Section 14, Third, designed to accomplish? The Alexander Report removes all uncertainty: the prohibition against retaliation which the Committee recommended and Congress enacted was aimed at the retaliatory *denial by a line or lines of service to a shipper* who had patronized a competitor, or has otherwise incurred the carrier's displeasure.

This is abundantly confirmed, time and again, by the language of the Committee.

When the Committee made its "Summary of Conferences and Agreements", 4 Alexander Report 288, it dealt with "retaliation" as follows:

> "Moreover, as has been repeatedly pointed out in this volume, shippers *require, above all else, a regular service*, and in this connection the testimony shows that by patronizing an outside line the shipper would not only *forfeit his rebates* but could be penalized *by being denied accommodations for future shipments even at the full rates of freight. Such retaliation* would leave the shipper unprotected since an independent line is not large enough to supply him with tonnage at all times."

It is obvious that the retaliation with which the Committee was concerned was (a) the forfeiture of accrued rebates, and (b) the blacklisting of shippers by denial of space for future shipments even at the full rate. The former evil could be, and was cured by the prohibition of deferred rebates; as defined in the statute, i.e., "a return of any portion of the freight money" which would be withheld if the shipper has violated his exclusive patronage agreement. Such a prohibition might nevertheless have left the carriers free to enforce exclusive patronage by denial of service. The Committee sought to prevent this by its condemnation of retaliation, thus furnishing a remedy for the evil described in the above quotation as deprivation of "*regular service*" (which "shippers require, above all else"), as "being denied *accommodations* for future shipments," and as "leav[ing] the shipper unprotected since an independent line is not large enough to supply him with *tonnage at all times.*"

This language is concerned with denials of *service*, of *vessel space*; on its face it has nothing to do with the imposition of a rate differential, or the payment of liquidated damages for a breach of the shipper's contract, which the Court below erroneously held to be retaliation. So far as contract systems based on *monetary* considerations were concerned, the Committee laid down the standards of legality with its recommendations against deferred rebates, unfair volume contracts, undue or unreasonable preferences or advantages, and unjust discriminations, recommendations translated by Congress into Sections 14, First, 14, Fourth, 16, and 17 respectively. *The Committee did not condemn, and never intended to condemn, contract systems enforced by monetary charges or discounts other than the narrowly defined deferred rebate system, or rate practices involving unfair volume contracts, or undue or unreasonable preference or advantage, or unjust discrimination. And by its condemnation of retaliation, the Committee and Congress meant to prohibit as unlawful per se the enforcement of faithful patronage by denial of service by the carrier, a feature absent from the dual rate system.*

Positive proof of this lies in the demonstrable fact that every substantial reference to the concept of "retaliation" by the Alexander Committee was coupled with the concept of denial of *service*, and never with imposition of a *monetary* disadvantage. For example (4 Alexander Report 313):

> "* * * it was frequently suggested that the lines should be compelled to accept cargo from all shippers when offered with due regard to the proper loading of the vessel and the tonnage available, *and should be prohibited from refusing accom-*

modations to any shipper by way of retaliation because he may have shipped by an independent line, or may have filed a complaint charging unfair treatment, or for other unjust reasons."

And, by way of introduction to its ultimate recommendations, the Committee stated: "A considerable number of complaints were also filed with the Committee objecting to * * * the unfairness of certain methods—such as fighting ships, deferred rebates, and *threats to refuse shipping accommodations*—used by some conference lines to meet the competition of non-conference lines." 4 Alexander Report 417. These were the methods condemned in Section 14, Second, First, and Third, respectively.

The Committee's concern with retaliation by denial of space stemmed from several instances of complaints about this practice, such as the case of a coffee importer who was denied space because he had "incurred the displeasure of the conference lines." 4 Alexander Report 166-168. Other similar examples of retaliation by denial of service were described by the Committee. 1 Alexander Report 18, 36.

Alternative forms of retaliation were brought to the Committee's specific attention: retaliation by the denial of space in trades between foreign countries, such as the case of a shipper who had used an independent line to carry his shipments from Brazil to the United States and was then refused service by conference vessels for his shipments from Brazil to Europe (1 Alexander Report 33, 45; 4 Alexander Report 164); and retaliation by denial of necessary lighterage service, where lighterage facilities were controlled by a conference line, because the shipper had

patronized a non-conference line. 1 Alexander Report 125.

The catchall clause "other discriminating or unfair methods," in Section 14, Third, clearly relates to these alternative methods of retaliation. The Committee aimed to prevent retaliation, not only by denial of service in the trade immediately involved, but by such "other discriminating or unfair methods" as denial of necessary accessorial services or denial of space in other trades.[39]

The ultimate recommendation of the Committee was that "all carriers should be prohibited from retaliating against any shipper by refusing space accommodations when such are available, or by resorting to *other unfair methods* of discrimination * * *." 4 Alexander Report 421. Obviously, the Committee was concerned about retaliation accomplished by *unfair* discriminations, serving to exclude shippers from full service.

The statute, as ultimately enacted, slightly transposes the wording employed by the Committee and employs the phrase "other discriminating and unfair methods." Upon this slender thread—the omission of the routine word "unjustly" or "unfairly" in front of the word "discriminatory"—depends the reason-

[39] Although Section 14, Third, is directed solely to the absolute prohibition of retaliatory denials of service, the Alexander Committee did not neglect to afford remedies for offensive carrier *rate* practices as well. Under Section 14, First, it condemned deferred rebates as unlawful *per se;* under Section 14, Fourth, it condemned unfair volume discounts; under Section 16, it condemned undue or unreasonable preferences or advantages; and under Section 17, it condemned unjust discriminations. The dual rate system, although not involving denial of service and hence not retaliatory under Section 14, Third, still must pass muster under these other sections.

ing of the Court below—central to its decision—that Congress in Section 14, Third, meant to condemn *any* discrimination, whether just or unjust, fair or unfair, substantial or unsubstantial. This reasoning, even assuming, arguendo, that dual rates are retaliatory within the meaning of Section 14, Third, is inconsistent with that of other courts which have held that in a regulatory statute, the bare term "discrimination" must be read to mean "*unjust* discrimination." As stated in *United States* v. *Wells Fargo Express Co.*, 161 F. 606, 610 (C.C., N.D. Ill., 1908), "It is difficult to conceive of the terms 'discrimination,' 'prejudice,' or 'disadvantage' as not associated with what is unjust, unreasonable, and undue."[40] And in *Platt* v. *LeCocq*, 150 F. 391, 397 (C.C., S.D. 1906), it was similarly held that the unmodified words "prejudice and disadvantage" used in a South Dakota transportation statute must be read to mean "*unreasonable* prejudice or disadvantage." See also *United States* v. *Koenig Coal Co.*, 270 U.S. 512, 518-519 (1926):

> "The words advantage, concession and discrimination in the statute [Elkins Act, § 1, 32 Stat. 847, 49 U.S.C. 41(1)] must be construed to mean unlawful concession, unlawful advantage, unlawful discrimination. It certainly was not the intention of Congress to punish the granting or receiving of a lawful concession, a lawful advantage or a lawful discrimination."

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[40] Although the case did not turn on this point, the United States argued, on appeal, in *American Express Co.* v. *United States*, 212 U.S. 522 (1909), that the lower court's concept that the unmodified term "discrimination" means "unjust discrimination" should be overruled. The Supreme Court, however, did not see fit to modify the lower court's decision.

The legislative history is wholly silent on the reasons, if any, for this particular phrasing which ultimately appeared in Section 14, Third; but even assuming that Section 14, Third, relates to rate discriminations, there is no evidence in the floor debates or Committee documents of any intention to embody in that section an absolute prohibition against *all* discrimination, rather than only *unjust* discrimination. On the contrary, what evidence there is clearly points in the other direction. The language of Section 14, Third, as enacted is identical with that recommended in the final report of the House Merchant Marine Committee on H.R. 14555, which bill ultimately became the Shipping Act, 1916. Report No. 659, 64th Cong., 1st Session. *This Report explains the provisions of what became Section 14, Third, by quoting verbatim the recommendation of the Alexander Committee* as to retaliation, containing the phrase "by resorting to other unfair methods of discrimination." Report No. 659, 64th Congress, 1st Session, p. 30. Since the language of the bill was explained in the language of the Alexander Report recommendation, it is apparent that it must be interpreted in the same sense as that recommendation.

The interpretation of the Court below not only is inconsistent with this history, but also runs counter to the conventional regulatory pattern, in which discriminations are invariably condemned only when *unjust*, or *undue*. In placing cardinal importance upon the omission of the routine word "unjustly," the Court gives to Section 14, Third, a meaning which would have a profoundly unsettling effect upon a large segment of our commerce, and one which wholly ignores the legislative intent expressed in the recommendation

of the Alexander Committee that "all carriers should be prohibited from retaliating against any shipper by refusing space accommodations when such are available, or by resorting to *other unfair methods* of discrimination * * *" (4 Alexander Report 421)—i.e., such unfair methods as involve denial of vessel space, or of necessary accessorial services, or of service in other trades.

IV.

COURT AND AGENCY DECISIONS HOLD THAT THE SYSTEM IS NOT ILLEGAL PER SE

The Court of Appeals decision overturns practices followed for decades in many of our major foreign trade routes. The Board and its predecessors have long believed that they have power to approve the dual rate system, and acting for many years upon that belief, it has approved the use of the system where justification therefor was established. The contention that the system is illegal *per se* has frequently been addressed to the Courts, but in every case has been rejected. The Court below explicitly recognized that its decision was unprecedented: it said that "the dual rate system has not been held by any judicial decision to be invalid under Section 14, Third; that is, without regard to the reasonableness or justness of the discrimination inherent in the system." (R. 244) We believe that a fair reading of the authoritative decisions will establish that the dual rate system is *not* unlawful *per se*, and that the decision below is in direct conflict with decisions of this Court involving the same issue.

A. The Decisions of the Courts.

In *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U.S. 474 (1932), this Court reviewed a District Court order dismissing a complaint that a dual rate system constituted a violation of the Sherman and Clayton Acts. The complainant argued that the dual rate system could not legally be approved by the Board. After a thorough analysis of the 1916 Act and its background, the Supreme Court explicitly held that jurisdiction over the matter was in the Board. The decision of the Court of Appeals in the case at bar is in direct conflict with this Court's decision in the *Cunard* case.

It was urged to the Court that its ruling in *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291 (1922), was controlling in *Cunard*. In the *Great Northern* case, the Supreme Court had held that where the question at issue "concerned merely the legal construction of an interstate tariff, no question of fact, either as an aid to the construction, or in any other respect, and no question of administrative discretion, being involved * * * the issue was within the primary jurisdiction of the courts without preliminary resort to the commission." 284 U.S. at pp. 481-2. Such is still the law. *United States* v. *Western Pac. R. Co.*, 352 U.S. 59, 69 (1956). The Court in *Cunard* rejected the argument that the dual rate system was, as a pure matter of law, illegal under Sections 14 and 17 of the Shipping Act. Instead, the Court held the issues would or might turn upon shipping economics and that primary exclusive jurisdiction therefore lay in the Shipping Board. It stated (pp. 485, 487):

> "Whether a given agreement among such carriers should be held to contravene the act may depend

upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions in respect of the shipping of foreign countries, and of other relevant circumstances, generally unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade; and with which that body, consequently, is better able to deal.

* * * * *

"Moreover, having regard to the peculiar nature of ocean traffic, it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications."

Thereafter, in *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297 (1937), this Court sustained the Board's predecessor's prohibition of the use of dual rates in the domestic intercoastal trades. Although the three-judge District Court, which had also sustained the Secretary's order, *had ruled in effect that the system was illegal per se*,[41] *the Supreme Court took pains to overrule this holding*, pointing out that:

"Whether a discrimination in rates or services of a carrier is undue or unreasonable has always been regarded as peculiarly a question committed to the judgment of the administrative body, based upon an appreciation of all the facts and circumstances affecting the traffic. [Citations omitted.]

"*In determining whether the present discrimination was undue or unreasonable the Secretary*

[41] *Swayne & Hoyt, Ltd.* v. *United States*, 18 F. Supp. 25, 27-28 (D.C., D.C. 1936).

was called upon to ascertain whether its effect was to exclude other carriers from the traffic, and if so, whether, as appellants urge, it operated to secure stability of rates with consequent stability of service, and, so far as either effect was found to ensue, to weigh the disadvantages of the former against the advantages of the latter." (p. 304)

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"Even though, as appellants seem to argue, the evidence may lend itself to support a different inference, we are without authority to substitute our judgment for that of the Secretary that the discrimination was unreasonable." (p. 307)

The Court further stated (p. 307, footnote 3) that the Alexander Committee was fully informed of the contract-rate system and expressly recognized the propriety of its use while condemning other systems. The Court therefore acknowledged that the dual rate system may be justified by the circumstances:

"The Report of the House Committee on the Merchant Marine & Fisheries, H.R. Doc. 805, 63d Cong., 2d Sess. (1914), recommended (p. 307) the prohibition of deferred rebates, adopted in § 14 of the Shipping Act, because it operated to tie shippers to a group of lines for successive periods, and because the system 'is unnecessary to secure excellence and regularity of service, a considerable number of conferences being operated today without this feature.' See, e.g., pp. 103-105, 200. The Committee recognized that the exclusive contract system does not necessarily tie up the shipper as completely as 'deferred rebates,' since it does not place him in 'continual dependence' on the carrier by forcing his exclusive patronage for one contract period under threats of forfeit of differentials accumulated during a

previous contract period. *Accordingly, the Committee did not condemn the contract system completely.* Cf. *W. T. Rawleigh Co.* v. *Stoomvaart*, 1 U.S.S.B. 285. The policy of the statute may properly be applied where, as in the circumstances in this case, the contract system must be taken as actually operating to effect a monopoly. Cf. *Eden Mining Co.* v. *Bluefields Fruit & S.S. Co.*, 1 U.S. S.B. 41".

In *Far East Conference* v. *United States*, 342 U.S. 570 (1952), this Court reviewed the denial by the District Court, in 94 F. Supp. 900 (D.C. N.J. 1951), of defendant's motion to dismiss a suit brought by the Government to enjoin alleged violations of the Sherman Act by the Conference through use of a dual rate system. The parties argued vigorously the question whether Section 14, Third, rendered the dual rate system illegal *per se*.[42] In its brief to this Court the Board requested that the Court not remand the case to the agency for administrative adjudication if Section 14, Third, rendered the Board without power to approve the dual rate system there involved.[43] In the

[42] The Section 14, Third, issue was argued in the following briefs in the *Far East* case:

1. Brief for the United States, pp. 22-23.
2. Brief of petitioners other than Isthmian Steamship Company, pp. 61-87.
3. Brief for Federal Maritime Board, pp. 40-42.

[43] The Board's brief in the *Far East* case states (pp. 41-42):

"We agree with Judge Frank's statement in *Civil Aeronautics Board* v. *Modern Air Transport* (2d Cir.) 179 F. 2d 622, 625, that to refer a matter to an agency for possible approval of what the law forbids, would be merely a 'delaying formalism' that would serve none of the purposes which the doctrine of primary administrative jurisdiction is intended

dissenting opinion, Justices Douglas and Black stated that it was not necessary that the case be first heard by the Board under the Shipping Act. The minority decision rested upon the ground, among others, that the dual rate system is illegal *per se* and may not be administratively approved. The majority of the Supreme Court, however, did not hold the system *illegal per se* and, following the doctrine of the *Cunard* case, ordered dismissal on the ground that the Board had primary jurisdiction of the matter in order to pass upon just those issues which the court below has here ruled to be irrelevant. The Court held in the *Far East Conference* case (p. 574):

> "The Court thus applied a principle, now firmly established, that in cases *raising issues of fact* not within the conventional experience of judges or cases *requiring the exercise of administrative discretion*, agencies created by Congress for regulating the subject matter should not be passed

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to promote—one of such purposes being to let the courts "make a workable allocation of business between themselves and the agencies.' (179 F. 2d at 625).

"Our insistence that the subject of the present suit be referred to the Board before adjudication in court is in no sense based upon the expedient of 'delaying formalism,' but upon the necessity of protecting the Board's primary jurisdiction as conferred by Congress, to regulate the activities of steamship conferences through the device, among others, of granting or denying them immunity from the normal rules of competitive behavior. *Assertion of the Board's primary jurisdiction necessarily rests on the proposition that the Board has power to authorize what the Court is here asked to prohibit.*

"The Board's power to approve the dual-rate system stems from section 15 of the Shipping Act and involves the question whether the power conferred by Section 15 is circumscribed by restrictions set forth in Section 14, paragraph Third, of the same statute."

> over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined."

In *Isbrandtsen Co., Inc.* v. *United States*, 81 F. Supp. 544 (S.D.N.Y. 1948), appeal dismissed without opinion *sub. nom. A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Co., Inc.*, 336 U.S. 941 (1949), Isbrandtsen sought to restrain the Eastbound and Westbound North Atlantic conferences from instituting a contract-rate system and to set aside orders of the Board's predecessor approving that portion of the conference agreement providing for institution of a contract-rate system. The injunction was granted, conditioned on Isbrandtsen's diligent prosecution before the Board's predecessor of a complaint challenging the validity of the agreements.

The District Court's comment on the question of whether the system is illegal *per se* is significant:

> "It may be that the 'exclusive patronage' provisions are prohibited by 46 U.S.C.A. § 812 [section 14, Shipping Act] and that the Commission is powerless to approve such provisions under 46 U.S.C.A. § 814. *Very considerable doubt upon such a holding is thrown by Swayne & Hoyt Ltd.* v. *U. S.*, 1937, 300 U.S. 297, 306, 307 and note 3, 57 S. Ct. 478, 81 L. Ed. 659, *and by the legislative history of the statute* H.R. Doc. No. 805, 63d Cong., 2d Sess., 1914, 287-292." 81 F. Supp. at 546."[44]

[44] Following this decision, Isbrandtsen prosecuted its complaint before the Board's predecessor, and the proceedings culminated in a Board order approving the proposed dual rate system and dismissing Isbrandtsen's complaint. That order was the subject of a suit for review in the United States Court of Appeals, District of

The subsequent Court decisions on the subject of dual rates have held that the differential or "spread" between contract and non-contract rates must not be arbitrarily fixed, *Isbrandtsen Co., Inc.* v. *United States,* 96 F. Supp. 883 (S.D. N.Y. 1951), affd. without opinion by an equally divided Supreme Court *sub. nom. A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Co.,* 342 U.S. 950 (1952); and that the institution of a dual rate system amounted to a new or modified agreement between the carriers, requiring prior Board approval under Section 15 as a condition to legality, *Isbrandtsen* v. *United States,* 93 App. D.C. 293, 211 F. 2d 51 (D.C. Cir. 1954), cert. den. 347 U.S. 990; *River Plate and Brazil Conferences, et al* v. *Pressed Steel Car Co.,* 124 F. Supp. 88 (S.D.N.Y., 1954).

Throughout the period covered by these decisions, the dual rate system was in extensive use. It seems plain that if the system were illegal *per se,* as has been urged in each of the above cases, the outcome would long since have been outright condemnation of the system. Rather, the governing judicial pronouncements are those in the *Swayne & Hoyt, Cunard, and Far East* cases, *supra,* which held that it was for the agency to decide whether the system is reasonable or unreasonable in each particular case.

B. The Decisions of the Board.

Neither of the opinions of the Court below so much as mentions the long course of decisions by the Board in this basic area of its specialized responsibilities. We do not urge that the Board's interpretation of Sec-

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Columbia Circuit, styled *Ezra Taft Benson* v. *United States,* No. 13316, in which proceedings are being held in abeyance pending the outcome of this case.

tion 14, Third, is controlling upon the courts. We do urge, most emphatically, that a court should not revolutionize a shipping practice of long standing without the most careful attention to the interpretation developed over many years by the Shipping Board, the Secretary of Commerce, the Maritime Commission and the Federal Maritime Board.

This Court has very frequently accepted as controlling, so long as it had a rational and sensible basis, the administrative interpretation of the governing statute which the agency is called upon to interpret and apply. Examples are: *Shields* v. *Utah Idaho R. Co.*, 305 U.S. 177, 182 ("interurban electric railway"); *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 146 (corporation "controlled by" another); *Gray* v. *Powell*, 314 U.S. 402, 411 ("producer" of coal); *NLRB* v. *Hearst Publications*, 322 U.S. 111, 131 ("employees"); *O'Leary* v. *Brown-Pacific-Maxon*, 340 U.S. 504, 507-508 ("course of employment").[45] Such a respect for the administrative interpretation is singularly appropriate here: the agency has been administering the statute for 41 years; its decisions have been woven into the fabric of a major industry; and ocean shipping is an activity many of whose characteristics are unique and uncommonly complex.

The Board in its decision here has supplied a careful chronological narration of the course of its own decisions and of the related court decisions in the dual rate system (R. 38-48). This we shall not duplicate, but shall show instead (a) the consistent Board rule

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[45] A contrary approach seems to have been followed in *Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144; *Otis & Co.* v. *SEC*, 323 U.S. 624; and *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 677-678.

that the system is not *per se* illegal, and (b) the developing precision of the standards which it has applied to determine whether the particular system is unduly discriminatory.

The earliest decisions were in two cases brought by shippers who sought to establish that Section 14, Third, made the dual rate system unlawful *per se*. The Shipping Board rejected the argument. *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, 1 U.S.S.B. 41, 46 (1922); *Rawleigh* v. *Stoomvaart et al.*, 1 U.S. S.B. 285 (1933). This issue was thereafter left at rest until the post-war litigation of respondents Isbrandtsen and the Departments of Justice and Agriculture. The Board has consistently held (in each of the cases discussed below) that Section 14, Third, is inapplicable and that the validity of each dual rate system must be determined on its own facts under Sections 15, 16 and 17 of the Act.

The standards which the Board has developed for approval have become quite precise. They are, moreover, by no means likely to encourage any unwarranted use of the dual rate sytsem.

The dual rate system will not be approved when inaugurated by a single line, which seeks to exclude all other carriers. *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, 1 U.S.S.B. 41 (1922).[46] It will not be approved in the intercoastal trade after 1933, when the Intercoastal Shipping Act gave the Board power to control minimum and maximum rates; the decisions

[46] This case contains some broad language about the generally discriminatory nature of the dual rate system (pp. 45-46) but has by subsequent decisions been confined to its single-carrier facts (*Rawleigh* case, *supra*, p. 290; *Isbrandtsen Co.* v. *North Atlantic Freight Conf.*, 3 F.M.B. 235, 241 (1950)), and in any case expressly rejected the argument of invalidity *per se* under Section 14, Third (p. 46).

carefully except foreign commerce. *Intercoastal Investigation*, 1 *U.S.S.B.B.* 400, 452, 454, 456, 467 (1935); *Gulf Intercoastal Contract Rates*, 1 U.S.S.B.B. 524; 529-530 (1936). The system will not be approved unless conference membership is open to any carrier in the trade, *Phelps Bros. & Co.* v. *Cosulich Societa, Etc.*, 1 U.S.M.C. 634, 640-641 (1937), upon payment of a reasonable fee, *Pacific Coast European Conference*, 3 U.S.M.C. 11, 14 (1948). It will not be approved when it is used to forbid shippers to use a loading range not served by the conference. *Contract Routing Restrictions*, 2 U.S.M.C. 220, 226 (1939). Nor will the Board allow liquidated damages which are retroactive or too heavy. *Pacific Coast European Conference*, 3 U.S.M.C. 11, 19 (1948); cf. *Isbrandtson Co.* v. *N. Atlantic Frt. Conf. et al.*, 3 F.M.B. 235, 246 (1950). Finally, the dual rate system will not be approved unless there is a showing that its use will not result in a virtual monopoly by the conference lines, nor if the Board concludes that the dual rate system will not in itself eliminate the rate instability due basically to over-tonnaging and malpractices such as secret rebates by member lines. *Trans-Pacific Freight Conference of Japan*, 4 F.M.B. — (1955).

A dual rate system which is subject to none of these defects will, on the other hand, be approved when the Board finds that its advantages are sufficient to outweigh the *prima facie* discrimination inherent in such a system. A variety of factors have received emphasis. No monopoly by a single or a few lines would be involved. *Rawleigh* v. *Stoomvaart et al.*, 1 U.S.S.B. 285 (1933); *Secretary of Agriculture* v. *N. Atlantic Continental Freight Conf.*, 4 F.M.B. — (1956). A convincing showing has been made that the dual rate

system is necessary to avoid rate-wars, to permit forward-trading by shippers, and to assure rate stability and regularity of service. *Rawleigh* v. *Stoomvaart, supra; Pacific Coast European Conference*, 3 U.S.M.C. 11, 17 (1948); *Isbrandtson* v. *N. Atlantic Frt. Conf. et al.*, 3 F.M.B. 235, 244-245; *Secretary of Agriculture* v. *N. Atlantic Continental Freight Conf.*, 4 F.M.B. — (1956). The support of shippers interested in the trade has been given weight. *Pacific Coast European Conference*, 3 U.S.M.C. 11, 17 (1948); *Isbrandtsen Co.* v. *N. Atlantic Frt. Conf. et al.*, 3 F.M.B. 235, 245 (1950); *Secretary of Agriculture* v. *N. Atlantic Continental Freight Conf.*, 4 F.M.B. — (1956). Commodities which are not carried by non-conference competitors cannot be included. Instant case, R. 63. The rate differential must not be so great as to prevent use of the non-conference lines. *Contract Rates—North Atlantic Continental Freight Conf.*, 4 F.M.B. 355 (1954); instant case, R. 62.

This record shows that the Board is exercising a close and discriminating judgment in the discharge of its responsibilities. It shows, moreover, that from the beginning it has been the settled rule of the Board that dual rate systems were not invalid under Section 14, Third, of the Shipping Act, 1916. The novel construction of the Court below would overthrow both this settled rule and the careful standards developed over the years by the Board in order to protect alike the shippers, the conference carriers, and their non-conference competitors.

CONCLUSION

The decision below, we submit, is clearly erroneous. It misinterprets the literal wording of Section 14 Third, of the Act, and gives that provision a meaning inconsistent with its legislative history and out of harmony with the rest of the Act. For it is clear that Section 14, Third, was aimed at the enforcement of patronage under sanction of denial of service, and not under the inducement of a monetary discount or penalty. Inducements or penalties of a monetary nature are dealt with in Sections 14, First, and 14, Fourth, where the statute condemns, respectively, deferred rebates and unfair volume discounts, and in Sections 16 and 17, by which the Board is given the responsibility of protecting shippers against undue or unreasonable preferences or advantages, and unjust discriminations, respectively. It is further clear that the Alexander Committee which expressly condemned some practices but not the contract rate system, knew of the then use of contract systems not materially different from the one *sub judice*, and further knew that their use would become even more widespread following prohibition of the deferred rebate system. Moreover, the Court of Appeals' decision gives to Section 14, Third, a breadth of meaning that writes Section 14, First, out of the Act, and may serve to impose substantial criminal liability upon carriers who have used the system for decades.

The decision below, furthermore, puts ocean common carriers in a position untenable in the face of rate cutting competition, and it would operate, unless reversed, to permit those evils of unrestrained competition apprehended by the Alexander Committee, and found by the Board in the instant case to be inevitable

in this trade unless stability can be restored by use of the dual rate system.

Finally, the decision below is in direct conflict with a generation of precedent and authority, including recent decisions of this Court.

The order of the Court of Appeals should be reversed.

Respectfully submitted.

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Date: September 13, 1957

APPENDIX A

Statutes Involved

A. Selected provisions of the Shipping Act, 1916 (extracted from Title 46, U.S.C.A.)

Sec. 14. (46 U.S.C. sec. 812.) No common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

First. Pay or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow a deferred rebate to any shipper. The term "deferred rebate" in this chapter [Act] means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term "fighting ship" in this chapter [Act] means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade.

Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $25,000 for each offense.

* * * * *

SEC. 15. (46 U.S.C. sec. 814.) Every common carrier by water or other person subject to this chapter [Act], shall file immediately with the commission [board] a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter [Act], or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; alloting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The commission [board] may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory

or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter [Act], and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the commission [board] shall be lawful until disapproved by the commission [board]. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the commission [board].

All agreements, modifications, or cancellations made after the oragnization of the commission [board] shall be lawful only when and as long as approved by the commission [board], and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

Sec. 16. (46 U.S.C. Sec. 815)

It shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality or description of traffic in any respect whatsoever, or to subject any particular person, locality, or

description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this Act.

Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense.

Sec. 17. (46 U.S.C. 816.) No common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

* * * * *

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No. 73

In the Supreme Court of the United States

OCTOBER TERM, 1957

FEDERAL MARITIME BOARD, PETITIONER

v.

ISBRANDTSEN COMPANY, INC., UNITED STATES OF AMERICA, AND SECRETARY OF AGRICULTURE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER FEDERAL MARITIME BOARD

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER FEDERAL MARITIME BOARD

The briefs of the Department of Justice and of Isbrandtsen Company, Inc. (cited herein as "D. J. Br." and "Isb. Br.") together aggregate some 223 pages, and raise issues not embraced within our petition or opening brief. We believe that reply is necessary. Our reply is organized, first, under the heads of our main brief, and then deals with the additional issues in subsequent sections.

STATEMENT OF THE CASE

The Court would not, we believe, be greatly assisted by an encyclopedic enumeration of what we consider to be the many errors and exaggerations in respondent Isbrandtsen's statement (Isb. Br. 5–61). Accurate statements are found in the brief of the Depart-

ment of Justice as well as in that of the Conference and in our own main brief. We shall, therefore, discuss only two factual issues, one of which is central and the other of which is important to Isbrandtsen's argument.

1. *The "Elimination" of the Independent.* Isbrandtsen throughout its brief ties its case to the assertion that inauguration of the dual rate system by the petitioner conference is designed to and will eliminate the independent carrier (Isb. Br. 3, 15, 25–26, 31–32, 42, 62–63, 75–77, 85–86, 158, 161). The Department of Justice apparently does not join in this charge (see Br. 3, 47–48), although at places its generalized arguments seem to accept it as true (see Br. 30–31, 39, 46). The contention is neither open to Isbrandtsen nor correct.

The Board's two decisions in the trades from Japan to the United States show the discriminating care with which it has considered this issue. In *Trans-Pacific Freight Conference of Japan*, No. 743 (Mar. 5, 1956), the Board refused to approve a contract rate system because it found that the dual rate system would be expected to reduce the independent carriage of Isbrandtsen to 2–5% of the trade, leaving the conference with a virtual monopoly without corresponding benefit to the trade (p. 22).[1] In the present case,

[1] Both Isbrandtsen (Br. 78) and the Department of Justice (Br. 46) quote at length from a passage in the 1951 brief of counsel for the Board in *Isbrandtsen Co.* v. *United States*, 96 F. Supp. 883 (S. D. N. Y.). Whatever the original accuracy or the authority of that passage, which indicates that monopoly is the goal of a dual rate system, it has none after the *Trans-Pacific* decision.

on the other hand, the Board stated, "We find it probable that Isbrandtsen will retain 10 percent or more of the cargo moving in the trade" (R. 62, 34). As Isbrandtsen furnished 10% of the 1952 sailings and 7% in the first half of 1953 (R. 27), the Board considered this "would be at least an equitable share of the trade" (R. 62).

By prehearing stipulation and order, the issues were reduced to five and the only one to which the facts could be relevant was confined to decision "on the basis of the facts existing in the administrative record as found by the Board itself" (R. 232–234). Isbrandtsen itself recognizes that it so stipulated to "limit the facts, for purposes of review" (Isb. Br. 5). Isbrandtsen cannot, therefore, base its case upon the view that the Board's finding must be discarded in favor of Isbrandtsen's repetitive and wholly unsupported assertions that it will be eliminated from the trade by the Board's decision.

The "facts" which an administrative agency is authorized to find must of course include informed estimates as to future developments as well as recitals of historical occurrences. E. g., *Hudson & Manhattan R. Co.* v. *United States,* 313 U. S. 98, 99; *Railroad Commission* v. *Oil Co.,* 310 U. S. 573, 581–583; *American Power Co.* v. *S. E. C.,* 329 U. S. 90, 112, 118. And, certainly, when this Court returned the dual-rate cases to the Board for the exercise of its "expert and technical knowledge * * * upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions in respect of the shipping of foreign countries" (*U. S.*

Navigation Co. v. *Cunard Steamship Co.*, 284 U. S. 474, 485; *Far East Conf.* v. *United States*, 342 U. S. 570, 573) it did not expect the reviewing court to jettison the administrative judgment. This is most emphatically plain here, where the administrative judgment is attacked only by general epithet.

It is finally to be noted that "Isbrandtsen has for a number of years continued its operation on one or more other trade routes against conference lines where a dual-rate system is in force with a differential as great or greater than the 10 per cent here involved." *Contract Rates—North Atlantic Cont'l. Frt. Conf.*, 4 F. M. B. 355, 360, 374 (1954).[2]

2. *The Isbrandtsen Principle.* Isbrandtsen states that it does not oppose the uniform rates of a conference system (Isb. Br. 71). It also states, in our view quite incorrectly, that it opposes the dual rate system simply because it is attached to its "right to be free from such entangling alliances with other carriers—overwhelmingly foreign lines"[3] (e. g. Isb. Br. 16).

The Board in its decisions has in no way disparaged the abstract desirability of Isbrandtsen's "right to be free." It has, however, repeatedly found that Isbrandtsen's competitive practices are destructive of rate stability and regularity of service. Isbrandtsen as a general rule maintains its rates 10% below the

[2] To be precise, the Board referred to Isbrandtsen-Moller, respondent's prewar predecessor, whose practices were the same as those of Isbrandtsen here involved. 4 F. M. B. at 360; *Section 19 Investigation, 1935*, 1 U. S. S. B. B. 470.

[3] It should be noted that Isbrandtsen, in other trades, itself operates foreign-flag vessels (R. 25).

conference tariff rate, whatever that rate may be (R. 29). In result, it was able in this trade to carry about three times as much cargo per voyage as the conference lines (R. 27).[4] The uniform conference rate is, therefore, a protective "umbrella" under which Isbrandtsen can attract cargo free of rate competition. *Secretary of Agriculture* v. *North Atlantic Cont'l. Frt. Conf.*, No. 725 (pp. 18–19); *Marx, International Shipping Cartels*, (1953), pp. 189, 196. The result is the strongest sort of pressure upon the conference members to open their rates in order to meet the independent's competition, and once this step is taken to demoralize the trade by rate-wars. (R. 29–32); *Section 19 Investigation, 1935*, 1 U. S. S. B. 470; *Cargo to Adriatic*, 2 U. S. M. C. 342 (1940). Once the rates are opened, and the trade becomes demoralized, Isbrandtsen is likely as it was here to be driven out almost completely (R. 31). The Isbrandtsen rate practices, in short, are highly beneficial to Isbrandtsen so long as there are uniform conference rates and a continued willingness by the conference carriers to maintain those rates; once the rate structure becomes competitive, as it must when Isbrandt-

[4] Isbrandtsen (though not the Department of Justice) insists that Japan loadings are unimportant, since the conference lines load more in the Philippines and Hong Kong (Isb. Br. 29–30, 76. If it were significant, it would also have to be remembered that Isbrandtsen loads in Pakistan, India, Ceylon, Indonesia and Malaya (where most of the conference lines do not load) and discharges in California (where a number of conference lines do not). But it is not significant, since *all* lines sail from Japan with substantial empty space (R. 28). This means that each line, Isbrandtsen and conference alike, is seeking as much Japanese cargo as it can get without regard to prior loadings.

sen's advantage under closed rates becomes too great, there is abundant history to show that a rate-war is inevitable, to the distress of the shippers as well as the carriers. *Section 19 Investigation, supra.*[5]

Isbrandtsen's practice of making a differential discount from the conference rate had no effect, prior to the rate war, in lowering the freight rate, or in preventing rate increases, since Isbrandtsen promptly moved in step with the conference change (R. 68). Nor, short of a breakdown of conference rate-making, can the Isbrandtsen practice loosen or modify the conference "monopoly." The uniform rate of the conference lines is the essential ingredient of Isbrandtsen's success. It obtains more cargo, and thereby reduces its costs per ton, in consequence of the conference rate agreement. When rates are forced to become competitive, Isbrandtsen is likely to be driven from the trade. Isbrandtsen, then, is not a determined gladiator against uniform conference rates, but is instead their major beneficiary.

I. THE HOLDING BELOW CONTRADICTS THE TEXT OF THE STATUTE

The respondents insist that Section 14, Third, makes the dual rate system unlawful because the car-

[5] In *Section 19 Investigation* the Shipping Board Bureau, after study of 6 demoralized trades (3 by Isbrandtsen-Moller), and after hearing the complaints of "a long line of shipper witnesses," recommended an order requiring adherence to filed export tariffs by the independent as well as the conference lines, to the end that *ad hoc* rate-cutting be terminated. The Secretary, doubtful as to his powers, simply required that the ex-

rier would thereby "retaliate against any shipper by * * * resort to other discriminating * * * methods, because such shipper has patronized any other carrier" (Isb. Br. 95–106; D. J. Br. 20–34).

We have shown in our main brief that "other" must here as so often be read in the light of the rule of *ejusdem generis* and to include only those "discriminating methods" which are similar to "refusing, or threatening to refuse, space accommodations when such are available" (F. M. B. Br. 19–24).[6] In that view of Section 14, Third, it is immaterial whether a dual rate system could ever be called "retaliatory."

If, however, Section 14, Third, were stretched to cover rate-making, then it would become important to determine whether the dual rate system can in any sense be considered "retaliatory." Isbrandtsen considers it "absurd" to consult the dictionary to determine what the Congress meant by "retaliate" (Br. 100–102). We, to the contrary, consider that the meanings offered in the dictionaries mark at least the natural outer boundaries of a statutory term. Every applicable definition we have found carries into the word "retaliate" the thought of revenge in like kind,

port rates be filed. His order was upheld on review. *Isbrandtsen-Moller Co.* v. *U. S.*, 300 U. S. 139.

[6] We find corroboration for this application of the rule in that: (a) The term "methods" is not, either in the Shipping Act or ordinarily, used to describe rates. (b) Throughout the Alexander Report we have found not one instance where "retaliate" was applied to rate practices. Where the context is sufficiently specific to show the sense, it, along with similar words such as "penalize" or "coerce," was directed to the denial of space or service, (1/14, 23–24, 30–31; 33, 35–36, 56, 87; 2/782–3; 3/113–14; 4/164–67, 288, 417), or in one instance, to a penalty rate (3/114).

of returning evil for evil or injury for injury.[7] Under a tolerably loose reading of the term, to deny service to a shipper who has used another line is "retaliation." To exchange a reduction of the tariff rate for a promise of exclusive patronage cannot under any normal usage of the term be said to be returning evil for evil nor to be an act of vengeance. No more is it "retaliatory" to hold the shipper to his promise on pain of reasonable damages.[8]

The Department of Justice simply ignores the dictionary and common usage, and asserts without explanation that it would be hard to imagine a plainer case of retaliation (Br. 22–23). It then proceeds to read "retaliate" as the equivalent of "coerce" or "p[illegible]lize" (Br. 23, 32, 33). This revision of the statutory word leads immediately into the insoluble semantic problem of whether the contract shipper is "induced" by the hope of the lower rate or "coerced" by the prospect of the higher rate. Almost every eco-

[7] See *Funk & Wagnalls New Practical Standard Dictionary* (1955): "to give like for like; especially, to repay evil with evil"; *Webster's New International Dictionary* (1957): "to return the like for; to repay or requite in kind, as an injury; to put or inflict in return (upon)"; *Wyld, The Universal Dictionary* (1952): "to pay back in kind; to reply to an action or utterance by a similar one; usually said of action taken, or words uttered, in reply to a hostile or unfriendly act or speech;" *Winston Dictionary* (1953): "to give like for like, especially evil for evil; revenge; requital;" *New Century Dictionary* (1956): "to return like for like, esp. (now usually) evil for evil: as, to retaliate for an injury"; *Oxford English Dictionary* (1933): "to make return or requital * * * of injury, insult, etc."

[8] As the Conference brief shows (pp. 48–49) the liquidated damage of 50% of freight is *less* than that recoverable in the absence of such a provision. The Board has invalidated damage clauses which were excessive. *Pacific Coast/European Conference*, 3 U. S. M. C. 11 (1940).

nomic transaction can be described, according to taste, as one of inducement or of coercion.[9] Quite apart from dual rates, any shipper is inevitably "coerced" by his necessities or "induced" by his opportunities into paying the freight rate demanded by the carrier as the price of carriage. The leap from "retaliation" to "coercion," therefore, at once places the controversy in a posture where it can be "decided" only by question-begging choice among two equally applicable verbs.

II. THE LEGISLATIVE HISTORY OF THE ACT DEMONSTRATES THAT THE CONGRESS DID NOT INTEND TO PROHIBIT THE DUAL RATE SYSTEM

The Departments of Justice and Agriculture and the Federal Maritime Board, the Government agencies before the Court, have considered that the Court might be assisted by a coherent collection of the relevant material from the Alexander Report. They have, accordingly, submitted a Joint Appendix to their respective briefs containing a selection of the material from which they draw their opposing conclusions.

We believe the Court may be spared much effort to weigh the force of opposing arguments if it were simply to read, even cursorily, the proceedings of the Alexander Committee which have been gathered into the Joint Appendix. The following reply to the briefs of the respondents is precautionary only, to

[9] See *Hale, Coercion and Distribution*, 38 Pol. Sci. Q. 471 (1923); *Cohen, Property and Sovereignty*, 13 Corn. L. Q. 8 (1927); in *United States* v. *Butler*, 297 U. S. 1, compare Justice Roberts' statement at pp. 70–71 with that of Justice Stone at p. 81; cf. *Holmes, The Path of the Law* (Collected Legal Papers, pp. 173–174).

suggest the points which should be noted and where possible to afford precise summaries instead of general impressions.

In our main brief we showed that the Alexander Committee: (a) precisely described and precisely condemned deferred rebates, fighting ships and denial of space, while it recognized and did *not* condemn dual rate contracts (Br. 35–42); (b) was thoroughly aware of dual rate contracts substantially identical with those at bar (Br. 42–50); (c) had clear notice that the contract rate system would necessarily replace the outlawed deferred rebate (Br. 50–54); and (d) was concerned with retaliation only insofar as it involved space and shipping service, not rates (Br. 55–62). The respondents advance a variety of reasons why these apparently compelling reasons must be ignored. None is valid.

1. *The Importance of the Alexander Report.* Isbrandtsen, but not the Department of Justice, urges that the Alexander Report was a mere interim document which should be ignored because the actual bills came later, with their own reports (Isb. Br. 109–111, 122–123). The facts are these:

Chairman Alexander after submission of his Committee report, introduced H. R. 17328 into the 63d Congress, 2d Session, but too late to receive action. An identical bill, H. R. 450, was introduced by him into the 64th Cong., 1st Sess. H. R. 14377, 64th Cong., 1st Sess., was a somewhat modified version; hearings were held on this bill but it was not reported out. In the meantime, owing to the European war, the Congress had become greatly concerned about the short-

age of merchant tonnage. H. R. 10500 had been introduced by Chairman Alexander to create a Shipping Board with the responsibility of developing a merchant fleet; it had two regulatory sections calling for licensing water carriers and prescribing their rates. H. R. 15455 was introduced after hearings on H. R. 10500; it was based upon the fleet development provisions of H. R. 10500 but with the regulatory provisions of H. R. 14377 (i. e., the Alexander Committee recommendation) substituted for the licensing and rate regulation provisions. See Mr. Alexander, 53 Cong. Rec. 8077–78.

H. R. 15455 became the Shipping Act, 1916. Its regulatory sections were explained by both the House and the Senate Committees by verbatim quotations of the recommendations of the Alexander Committee report, without any independent discussion of the regulatory provisions by either current committee. H. Rept. No. 659 (pp. 27–32) and S. Rept. No. 689 (pp. 7–12), 64th Cong., 1st Sess. The floor debates in both houses were extensive but were directed almost exclusively to the fleet development provisions; the regulatory features received only scattered and desultory attention (53 Cong. Rec. 8077–78, 8080, 8087, 8095, 8105, 8354, 12,345, 12,449–12,450).

Thus, while the Shipping Act followed nearly two years after the Alexander Report, that report is the authoritative and, indeed, almost the exclusive source of the legislative history of the sections here involved.

2. *The Dual Rate Contracts.* The respondents accept (Isb. Br. 60–61, 118–121; D. J. Br. 37–41) with understandable enthusiasm the inexplicable view of

Judge Washington below that the Alexander Committee was concerned only with requirements contracts of a quite different nature than those at bar (R. 247). We believe a detailed summary rather than further argument is called for.

While we do not find close precision possible, there were by our count about 70 examples of dual rate contracts or systems exhibited or described, in varying detail, to the Alexander Committee. They show the following characteristics:

a. *Trades.* They were drawn from the following trades [references to volume/page]:

1. New York—River Plate	40	[1/97–98, 120; 226, 246–263, 289, 390; 4/172–4].
2. New York—Brazil	8	[1/155, 202–203, 206, 213, 246–48; 4/160].
3. New York—South Africa	4	[1/277–78, 286–88; 4/96–97].
4. New York—Far East	2	[1/390–91, 446–47; 4/116].
5. New York—Chile	2	[1/487, 490–92; 4/186–87].
6. New York—Europe	2	[1/615; 2/818–19].
7. New York—Indonesia	1	[1/341–2].
8. New York—Puerto Rico	2	[1/632–34].
9. New York—Cuba	1	[1/653–54].
10. India—U. S. Pacific	1	[2/879].
11. London—New York	1	[2/1252].
12. Netherlands—New York	1	[3/90].
13. Egypt—New York	1	[3/113–14].
14. Egypt—U. K.	1	[3/302; 4/102].
15. General or unstated	3	[1/253, 460–61; 2/767–69].
	70	

b. *Carriers.* The contracts were offered on behalf of—

1. All conference lines	14	[1/247–249, 254, 261–63, 287–88; 2/768; 879; 3/90, 118–14; 4/96–97].
2. A single line, to go by its vessels or, frequently, by others designated by it, with an understanding that shipments by other conference lines were no breach (1/226, 227; 4/172–73).	33	[1/97–98, 120, 250–53, 255–61, 263, 289–90].

3. A single line only	3	[1/490–92, 653–4; 2/1252; 4/206].
4. Single line if less than 3 months and if quantity small, otherwise all conference lines.	1	[1/155, 202–3, 206].
	51	

[1] The Department of Justice finds only 3 of the 43 contracts introduced by Mr. Gerhard to be joint contracts for the conference (Br. 38). In fact: (a) Mr. Gerhard introduced 38 not 43 contracts (the Department of Justice counted 5 confirming and duplicating letters; 1/246–47, 249–50, 253, 260–61, as contracts). (b) 8 not 3 of the Gerhard contracts called for shipment by any of the named conference lines (1/247, 247, 248, 254; 261, 262, 262, 262). (c) There were in addition 6 other joint contracts introduced by other witnesses, cited above. (d) "As a matter of fact," even when only one line contracts, "each contractor is allowed to ship by any of the other lines working in harmony with us" (1/277).

c. *Term.* The contracts had the following periods during which they were to be effective—

1. 4 months	1	[1/249].
2. 4–16 months	2	[1/289–90, 616–17].
3. 5 months	3	[1/257, 260–61].
4. 6 months	2	[1/257, 262].
5. 7 months	2	[1/249, 259].
6. 8 months	5	[1/249, 253, 256, 258–60]
7. 9 months	2	[1/260–61].
8. 10 months	2	[1/120; 261].
9. 11 months	5	[1/250–251, 259].
10. 1 year	18	[1/97–98, 252–258, 262, 288, 446–7; 460–1, 632–34, 654; 2/768; 4/102, 116, 160].
11. 1 year subject to 30 days notice	1	[1/246–47].
12. "Season or year"	1	[3/90].
13. 2 years	1	[3/113–14].
14. 1–3 years	1	[1/413; 4/236].
15. Indefinite, subject to change without notice.	1	[1/487, 490–92; 4/186–87]
16. Indefinite, subject to 30 days notice.	3	[1/247–48].
17. Indefinite, subject to 9 months notice after 2 years.	1	[1/287; 4/96].
	51	

d. *Space Obligation.* They imposed the following space obligations upon the contracting carrier or carriers—

1. Provide tonnage on 20 days notice	7	[1/97–98, 120, 250–52, 255, 289–90].
2. Provide space on ample notice	1	[1/248].
3. Provide tonnage on reasonable notice.	1	[1/251].
4. Provide transportation	1	[1/254].
5. One steamer a month	5	[1/258, 287, 633; 4/96–97].
6. Guarantee regular sailings	1	[3/302, 4/102].
7. Line said in discussion to be "liable" or "responsible" to provide space.	2	[1/155, 226–27, 277–78; 4/160, 172].
8. Contracts reproduced; no express obligation.	30	[1/247, 249–251, 253, 255–57, 259–62, 288].
9. Contracts not reproduced, but discussed without mention of responsibility to provide space.	16	[1/341–2, 380–81, 390–91, 413, 446–47, 460–61, 487–92, 615–17, 653–54; 2/767–69, 818–19, 879–80, 975, 1252; 3/90, 113–14; 4/116, 186–87, 236].
	64	

e. *Rate Changes.* The contracts made the following provisions with respect to rate changes during the term of the contract—

1. Rate fixed during term	39	[1/202–3, 213, 247–250, 252–63, 288, 390–91, 460–61, 616; 2/818–19; 3/302; 4/102].
2. Shipper gets benefit of reductions	19	[1/97–98, 249–52, 254, 287–90, 633–34; 4/172–74, 237].
3. As favorable as any shipper	2	[1/253, 287; 4/96–7].
4. Rate increases on 30 days notice	1	[1/246–7; 4/163].
5. Changes without notice	1	[1/490–2].
	62	

f. *Commodities.* The contracts covered—

1. Specific commodities in which shipper is interested with—		
a. No provision as to other freight	25	[1/247, 249, 251, 253, 256–62].
b. Understanding that he has benefit of any rate in any other contract.	3	[1/286–90].
2. Gunny sacks	1	[2/879–80].
3. Cotton	1	[3/113–4, 302; 4/102].
4. All freight	16	[1/97, 248–252, 255–56; 259, 262, 487, 632–34; 3/90; 4/186–87].
	46	

g. *Shippers.* The classes of shippers to whom the contract rates were extended were the following [with

the numeration referring to witnesses rather than contracts]—

1. Offered to all shippers of the commodities involved.	8	[1/202–3, 206, 213, 226–7, 263, 267, 277–8, 390–1, 460–1, 615–17; 3/90, 113–4].
2. Large shippers only	5	[1/341–2, 416–7, 634–36; 653–54; 2/767–69].
3. Single shipper only	1	[1/499–2].

14

The contract at bar contains no significant feature not found in the 1913 contracts examined by the Alexander Committee.[10] The shipper agrees to use only the conference line vessels, as by their terms in 14 of the 1913 contracts and, in practice, in 32 others as well. The term of the contract is indefinite, subject to termination on 3 months' notice (R. 205); it binds the shipper for a shorter period than 46 of the 1913 contracts, of which only 4 with 30 days' notice had a shorter term. The conference carriers here "undertake to maintain a shipping service which shall be adequate to meet the reasonable requirements of the commerce" (R. 204), and "to carry the Shipper's cargoes so far as their regular services are available" (R. 203); this obligation is at least comparable to any in 1913 and is more precise than the majority of the 1913 contracts, which were silent. Here, as in most of the 1913 contracts, the shipper gets the immediate benefit of rate reductions (R. 203). From 2–3 months

[10] None of the 1913 contracts provided liquidated damages, although one was said to be enforced by the refusal of space to violators [3/113–14]. The Board held in this case that it had been presented with no evidence to show whether the 50% liquidated damages amounted to a penalty (R. 67). See the Conference brief, pp. 46–49.

notice is required for rate increases (R. 203) (along with power in the shipper to terminate on 3 months' notice); while most of the 1913 contracts had rates fixed during the term, at least 2 permitted increase on shorter notice. The present contract covers all of the shippers' freight (R. 203); many of the 1913 contracts were tailored to each customer and listed only the specific commodities which he would ship, but 16 covered all freight while another 3 would on request include any other contract commodity. The contract at bar, like most but by no means all of the 1913 contracts, is open to large and small shippers alike.

The Alexander Committee was not oblivious of all of the evidence of a contract rate system which was placed before it. To the contrary they showed a consistent and lively interest. The Committee Chairman, or occasionally another member, made a practice of inquiring of his own motion about the sort of shipper contracts employed by the line or in the trade. He or another member did so 11 times.[11] Almost invariably, once the existence of a contract system was established, he would inquire of the witness whether the contract rates were available only to the large shipper or to all. He or another member did so 18 times.[12]

The Department of Justice seeks to put the 1913 contracts aside on several wholly unsupported grounds. First, it says that in 1913 the contracts

[11] 1/273–74, 277–78, 390–91, 446–47, 460–461, 487, 490–91, 616–17, 632, 653–4, 1255.

[12] 1/107–8, 203, 263–4, 267, 278, 341–2, 390–91, 446–47, 460–61, 487, 490–91, 616–17, 634–36, 653–54; 2/767–9, 964/5, 1026, 1255.

were intended to secure business, and not to discourage non-conference competition (Br. 40). None of us can in 1957 read the minds of the 1913 shipping men, but the understanding of the Alexander Committee—which is the only understanding in issue—is entirely clear. It described these various forms of exclusive patronage contracts under the heading "*Meeting the competition of lines outside the conference*" (4 Alex. Rept. 287, 290–292).

Second, the Department says that only a few of these contracts were joint contracts or made for the benefit of all conference lines (Br. 37–39). We have shown (note 10 above) that its arithmetic is wrong. More basically, whatever the numerical count, the Alexander Committee in its summary recognized and described the joint contracts made for the account of all conference lines, and did so in terms *exactly* applicable to the present contract (4 Alex. Rept. 290).

Third, the Department of Justice suggests that perhaps the absence of a statutory prohibition of dual rate contracts reflected simply the fact that "the exclusive dealing arrangements were of such a wide variety and form that it would have been extremely difficult for Congress to have specified the particular ones to be outlawed." (D. J. Br. 41). This is an extraordinary contention. One does not ordinarily argue that a prohibition (penalized at $25,000 for each offense) is to be inferred because Congress might have found it too difficult to draft. And in any case, Congress had at hand a simple model which would reach every such contract. H. R. 4660, 62d Cong., 1st Sess., provided in Section 23 that it was

unlawful "to make a contract for the exclusive carriage of goods * * * conditioned partly on the shipment of such goods in the future by no other * * * lines of vessels."[13] It received no action.

Finally, the Department of Justice in its effort to explain the failure to forbid a dual rate system completes the case for the petitioners. It notes (D. J. Br. 41, fn. 19) that another reason for this failure may have been because there was no shipper complaint against this type of arrangement. Precisely so: without the period of deferment, the shipper retained his freedom if the non-conference opportunity was sufficiently attractive. It would not be necessary, as with deferred rebates, for the outside competitor to wait until the end of the year (or longer) when, according to an independent operator, "I noticed the people who had the least amount of rebate due, and gradually worked my way into them" (1 Alex. Rept. 141). The contrast between the two systems, as important in Singapore as in Washington,[14] was observed by the Committee (4 Alex. Rept. 307) and was quite evidently acted upon.

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[13] The full text is quoted in the Conference Brief (p. 76).

[14] Straits Settlement Ordinance No. XXVIII of 1910 imposed a 20% tax on every bill of lading and authorized the Governor in Council to exempt lines not parties to injurious agreements. The consular report to the Alexander Committee (3/215) explained that this Act was repealed when the steamship lines in negotiation with the Governor agreed to abandon the deferred feature, and to pay rebates at the end of the contractual period. See Ordinance No. XV of 1911. See, also, the Committee's frequent comments on the *non*-deferred but sliding rebate in the Bermuda and Caribbean trades (4 Alex. Rept. 219–223, 288, 292).

3. *The "First" Dual Rate Systems.* Isbrandtsen would have the Court erase this impressive evidence of widely used exclusive patronage contracts because, it says, they *first* came into use in 1922 and thereafter (Isb. Br. 119–121).[15] The Department of Justice lends footnote support to this contention (Br. 40).[16] As is so often the case, some history is necessary to reconcile technically correct statements with the obvious facts.

As indicated above, the contract rate system was in wide use just prior to World War I. During that war, all of the steamship conferences in the foreign trade of the United States suspended or disbanded.[17] Immediately after the war the rates in the foreign trade of the United States were set by the Shipping Board, which was initially the only operator in the trades, with the re-entering foreign-flag lines following its lead. But overtonnaging brought on a collapse of the rate structure in the Spring of 1920.[18] The Shipping Board accordingly in March 1920 organized its own "Conferences" of managing agents for the Fleet Corporation shipping lines.[19] The for-

[15] Isbrandtsen simply ignores the fact that the exclusive patronage contract condemned in *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, 1 U. S. S. B. 41 (1922) was inaugurated in May 1919 (1 U. S. S. B. at 42).

[16] Its reliance is on *Marx*, International Shipping Cartels (1953) p. 210, who also explicitly recognizes that dual rate contracts were well known to the Alexander Committee and were not condemned by the Congress (pp. 56, 204, 218).

[17] Report of U. S. Delegates to Inter-American Maritime Conference (Govt. Printing Office, 1941) p. 147.

[18] Id. pp. 147–148.

[19] Fourth Annual Report of the U. S. Shipping Board (1919–1920), pp. 145–146.

eign-flag operators were shortly thereafter invited to participate, and "Ultimately these conferences were merged into the steamship conferences as they had existed before the World War." [20]

It is true that *these* conferences first initiated dual rates in the 1920's and 1930's. But the fact is quite irrelevant; the particular conferences were not in existence prior to the war.[21] The Maritime Administration document used by Isbrandtsen shows for example that the River Plate and Brazil Conference inaugurated dual rate contracts in 1930; this is correct, but the more informal conferences which in 1913 separately served (a) the River Plate and (b) Brazil exhibited to the Alexander Committee some 46 examples of dual rate contracts (*supra*, p. 12).

4. *The Claim of Committee Disapproval.* The respondents, after urging that there were no exclusive patronage contract systems in existence in 1913, proceed somewhat inconsistently to urge that these systems were disapproved by the Alexander Committee (Isb. Br. 113–18; D. J. Br. 41–49).

Isbrandtsen's affirmative argument for disapproval rests solely upon paragraph (4) of the Committee's recommendations. This paragraph, which is the gen-

[20] Report of U. S. Delegates to Inter-American Maritime Conference (Govt. Printing Office, 1941) p. 149.

[21] Any exception may be the North Atlantic Westbound Freight Association; the agreement of which as approved by the Shipping Board (No. 6) was said to have been made in 1910, when as the Liverpool/New York conference it was one of the 4 separate port conferences serving the United Kingdom to North Atlantic trade. There was in any case no contract rate system in this trade before World War I. (4 Alex. Rept. 54, 65.)

esis for Section 14, Fourth, is separated from paragraph (6) containing the "retaliation" recommendation; it reads (4 Alex. Rept. 421)—

> (4) That *rebating* of freight rates to shippers be made illegal; and that, with due regard to the proper loading of the vessel and the tonnage available, *discrimination* between shippers, or ports, in the matter of rates and space accommodations be prohibited. In this connection it is the belief of the committee that water carriers should be required to charge equal rates to all shippers, irrespective of the volume of freight offered for shipment. [Emphasis added.]

But neither the Alexander Committee nor its witnesses used the italicized words in a sense which would include a dual rate system which did not discriminate among the shippers to whom the contract was offered.

"Rebate" was used to describe a secret or discriminating favor granted one or a few shippers.[22] Significantly, the term was used by the Committee in contexts which necessarily excluded the dual rate contracts: It said of the Australian trade, "Contracts with shippers are made, but all the lines have stated to the Committee that there are no rebates, deferred or otherwise, in the trade * * *." (4 Alex. Rept. 105). In the Asiatic trade, the Committee said,

[22] *Committee:* 1/135; 2/1400; 4/115, 116, 313–14: *Witness:* 1/440, 632, 2/967, 967, 1317; 3/212, 213, 214, 234, 287–88.

We note, though citations would be supererogative, that (a) the term was most frequently used in a context which showed its employment as short-hand for deferred rebate, and (b) it was also frequently employed, as in the paragraph at issue, where its meaning cannot be derived from the immediate context.

"None of the contracts with shippers, most of which are joint contracts, it was testified (Vol. 1, p. 390) give special rates or rebates to some shippers which are denied to others." (4 Alex. Rept. 116). A witness explained that "we have special contracts with shippers, but no system of rebates" (1 Alex. Rept. 632). We have found no instance where the context shows that either the Committee or its witnesses equated "rebate" with the contract rate system.

The term "discrimination" was used by the Committee or its members in a considerable variety of senses. Where the context shows the sense, it meant to them (a) favoring the large shipper over the small;[23] (b) secret rebates;[24] (c) rates favoring exporters of another country;[25] or (3) denial of space or discharge facilities.[26] We have found no passage where the context showed the Committee, any of its members, or any of its witnesses to be using the term in connection with the exclusive patronage contracts. To the contrary, one witness in describing his exclusive patronage contracts said, "We would give anybody else the same rate on a similar contract; no discrimination whatsoever," and the Chairman pursued him only to ensure that the contract was in fact available to all (1 Alex. Rept. 203). The Chairman asked another witness, in connection with his shipper contracts, "whether or not you give to the large shippers and the small shippers the same rate; in other words

[23] 1/203, 446, 490; 2/767, 768, 876, 918, 920, 1026, 1103, 1192, 1401, 1408; 4/161, 236, 307.

[24] 1/135, 625; 2/1399; 4/216–17, 236, 300, 313, 416.

[25] 1/207–208, 627–28; 2/896, 897–98, 1128, 1263; 4/168.

[26] 1/53, 56, 116, 121, 125; 4/313.

is there a discrimination between large shippers and small shippers in the rate given them?" (1 Alex. Rept. 446). He asked a third if compulsory filing should include "contracts with shippers," and in the next question went on to ask if "it would be fair also if the law provided they should not discriminate between shippers?" (2 Alex. Rept. 1255).

The Department of Justice, in contrast to Isbrandtsen, does not seem to rely very heavily upon the Committee's Recommendation (4) (though see Br. 26), but rather to rest upon an asserted equivalence between the deferred rebate and the exclusive patronage contract (D. J. Br. 41–49). Its argument rests on three quotations from the Alexander Committee. Each, even as quoted in the Department's brief, shows that the Committee made consistent distinction between the two: the salient vice of the deferred rebate was its deferment (*id.*, p. 42); the shipper is tied by fear of "forfeiture of all accumulated rebates" (*id.*, p. 42); and it was particularly effective because "the shipper would not only forfeit his rebates but could be penalized by being denied accommodations for future shipments even at the full rates" (*id.*, p. 43).[27]

5. The "*Argued*" *Distinction.* Both Isbrandtsen (Br. 116–118) and the Department of Justice (Br. 41–42, 60) urge that the Court must disregard the Commit-

[27] The Department's readiness to equate the contract rate with the deferred rebate system may rest in part upon a misunderstanding of the latter. Section 14, First, of the Act is sufficient demonstration that the deferred rebate is not payable for exclusive patronage "during the contract period" but that exclusive patronage is requisite *also* during the "time after expiration of the contract" and prior to payment (see D. J. Br. 41).

tee's clear distinction between the deferred rebate and "the ordinary contract system" (4 Alex. Rept. 307):

> By deferring the payment of the rebate until three or six months following the period to which the rebate applies ship owners effectively tie the merchants to a group of lines for successive periods. In this connection *it is argued* that the *ordinary contract system* does not place the shipper in the position of continual dependence that results from the deferred rebate system. [Emphasis added.]

The word "argued," they say, means that this was merely a summary of witness testimony, not the Committee's own view.[28]

Their insistence is somewhat remarkable, since they (D. J. Br. 42; Isb. Br. 132–136, as Judge Washington below, R. 246) are forced to the position that this Court, writing through then Justice Stone, was similarly misled in *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 307. This Court's summary of the Alexander Report may not have been necessary to its decision, and indubitably was in footnote rather than double-lead text. We believe, nevertheless, that there is some presumption against an argument which proceeds to the conclusion that Justice Stone was incapable of reading a legislative report.

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[28] Isbrandtsen (Br. 117) seeks to reinforce its point by misquoting a footnote which in fact refers to an *earlier and different* summary as representing "the views of leading exporting and importing firms" (4 Alex. Rept. 295). In the next sentence it converts "the advantages * * * as presented to the Committee" into "the *arguments* 'presented to the Committee' ", supplying both its own words and its own italics.

We have already shown that the Committee nowhere suggested that it had any objection of its own to the contract rate system (Br. 35-42). It should also be noted that of the 55 witnesses who testified before the Committee *not one* opposed the contract rate system which, like the one involved here, was open to all shippers. Of the 279 shippers who responded to a circular letter of the Committee, there was only 1 who was opposed to a contract rate-system which was open to all (2 Alex. Rept. 1398, 1405) and even his complaint seems to have been grouped by the Committee with the objections to quantity discount (*id.*, 1404). The Department of Justice itself notes the absence of complaint against the system (D. J. Br. 41). A summary of an unopposed "argument" is not much different from a categorical statement.

In fact, the verb "argued" simply reflects a rhetorical device frequently employed by the Committee draftsman. In the 12-page summary of advantages and disadvantages of the conference system, he employed similar terms on 13 other occasions, and in virtually every case to make a point with which the Committee was demonstrably in agreement.[29]

[29] (a) It was "contended" that the conference system was necessary to regular service (p. 295), that it offered protection to both shippers and carriers (p. 295), and that in general the U. S. export rates were in line with the European (p. 301). (b) It was "claimed" that the security to steamship investment resulted in better service (p. 297). (c) It was "asserted" that rate wars were harmful (pp. 297, 298, 298), that shippers obtained better service from liners than tramps (p. 300), that pooling permitted service to minor ports (p. 303), and that conferences are able to fix rates arbitrarily (p. 305). (d) it was "regarded" that unrestrained competition was demoralizing

Beyond all this, whether the Committee was summarizing a contention or its own views, the fact remains that in summarizing the "Disadvantages of Shipping Conferences and Agreements, as Now Conducted" (4 Alex. Rept. 304), the Committee considered that the one point of immediate relevance to the deferred rebate system was deferring its payment for 3–6 months after the contract period (*id.*, p. 307), and considered it relevant also to point out in the next sentence, that "it is argued that the ordinary contract system" was different.

III. COURT AND AGENCY DECISIONS HOLD THAT THE SYSTEM IS NOT ILLEGAL PER SE

There is no occasion to reargue the decisions of this Court, in the interpretation of which the Court needs no assistance from us. But we believe it *is* necessary to eliminate the confusion created by the respondents (D. J. Br. 50–55; Isb. Br. 139–147) as to the agency decisions of the Board and its predecessors.

1. *Sec. 14, Third.* There is not the slightest inconsistency, in decision or in language, in the agency's interpretation of Section 14, Third. In 1922, in the first case to present the issue, it said of the dual rate

(p. 300). (e) it was "argued" that conference lines had a virtual monopoly of some trades (p. 306), as well as that contract rate systems were better than deferred rebates (p. 307). (f) Finally, "according to" some, unrestrained competition led to consolidation of lines (p. 301).

The second paragraph of the Committee's recommendations three times uses the verb "claimed" to describe the advantages of conferences and then continues in the next sentence: "These advantages, the Committee believes, can be secured only by" sanctioning conferences subject to Government supervision (4 Alex. Rept. 416).

contract that there was no evidence "tending to show direct or indirect retaliation against the complainants for patronizing other carriers. * * * That part of the complaint alleging violations by the carrier of paragraphs 3 and 4 of section 14 of the act is, therefore, without support." *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, 1 U. S. S. B. 41, 46.[39] From 1922 down to 1957 this decision has been followed without the slightest deviation (F. M. B. Br. 71–73).

2. *Secs. 15–17.* It is not surprising that there should be less than perfect consistency in applying the broad and general standards of "unjustly discriminatory or unfair" (Sec. 15), "undue or unreasonable prejudice or disadvantage" (Sec. 16, First) and "unjustly discriminatory" rate (Sec. 17). No agency, and possibly no court, can claim 40 years of undeviating movement across fields so broad as these.

Specifically, in two cases the Shipping Board used broad language which, isolated from the facts of the cases and from other passages in the same opinion, pointed to a view that *any* dual rate contract would be unjustly discriminatory. *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, 1 U. S. S. B. 41, 44–46 (1922); *Intercoastal Investigation, 1935*, 1 U. S. S. B. B. 400, 451–52. The *Eden* contract clearly merited condemnation as "unjust": a single carrier was in-

[39] We have no idea why Isbrandtsen insists that the Board first passed on Sec. 14, Third, in 1948 (Isb. Br. 93, 140). As for the Department of Justice, its anxiety to dismiss the *Eden* holding leads it into contradiction of its main argument, for if *evidence* of retaliation is necessary (D. J. Br. 52, n. 28) before a dual rate contract is invalid, it is not invalid on its face and the decision below must be reversed.

volved,[31] the contracts ran for 3 years, and 2-way exclusive patronage was required for a 1-way discount. See *Rawleigh* v. *Stoomvaart et al.*, 1 U. S. S. B. 285, 290 (1933). The *Intercoastal* case specifically recognized that, before the 1933 grant of power to regulate intercoastal rates, "the contract rate system served a useful purpose" (1 U. S. S. B. B. at 454) and on review the Secretary took pains to make plain that the decision was inapplicable to the "circumstances attending transportation in foreign commerce" (1 U. S. S. B. B. at 467).

Apart from some of the language in these two cases, each of which presented facts calling for the Board's condemnation, the agency opinions and decisions under Sections 15–17 have been wholly consistent[32] (F. M. B. Br. 71–73). It would be extraordinary indeed if the Board's consistent decisions under Section 14, Third, were to be dismissed as inconsistent and unreliable because some of its language, but not its decisions, in two cases under Secs. 15–17 was overbroad as measured by subsequent cases. The field of ocean shipping, of all regulated activities, should not be dis-

[31] The Department of Justice, in asserting that concerted activities are worse than those of a single line (Br. 53) shows again more attachment to the theoretical law of restraints of trade than to the realities of ocean transport. Obviously, a multi-line contract system gives the shipper the choice of services, while under a single line contract he has no choice.

[32] The Department of Justice manufactures an inconsistency (Br. 34, 54) by reading *Contract Routing Restrictions*, 2 U. S. M. C. 226–227 (1939) as disapproving the dual rate system. In fact not the contract rate system but only one provision (forbidding use of direct service from the Great Lakes) was disapproved (p. 227).

rupted because the regulatory agency is staffed by men and not by angels and has, years ago, on a different issue, used words too broad to be applied in subsequent cases.

IV. THE DUAL RATE SYSTEM IS NOT UNJUSTLY DISCRIMINATORY

Isbrandtsen, but not the Department of Justice, argued to the court below that the dual rate system of this Conference could not be approved because it was "unjustly discriminatory" under Sections 15 and 17 of the Act and gave an "undue or unreasonable preference or advantage" under Section 16 of the Act. The court below expressly ruled (R. 243):

> Whether or not these characteristics exist depends upon the facts and circumstances of the case as found by the Board; and the courts will not substitute their judgment in this regard for that of the Board.

Isbrandtsen renews its contentions before this Court (Isb. Br. 148–155). The Department of Justice, apparently no longer completely content to rest upon Section 14, Third, alone, offers a lengthy footnote in support of this contention (D. J. Br. 29–30). Neither respondent argues that, if the Board has power to approve, the power was unlawfully exercised on the facts of this case. The report of the Board (R. 23–37, 60–69) shows that no such contention could reasonably be made. The issue presented by the respondents comes down, then, to the simple question as to whether every dual rate system, in any circumstances, is necessarily and *per se* unlawful under Sections 15–17 of

the Act. Along with that issue, we feel the Court
entitled to an explanation of the Board's policy wit
respect to the existing but unapproved dual ra
systems.

A. SECTION 17 DOES NOT MAKE DUAL RATE CONTRACTS UNLAWFU
PER SE

Isbrandtsen explicitly bases its argument on th
proposition that "Section 17 of the Shipping Act i
this respect has its immediate origin in and bears clos
resemblance to section 2 of the Interstate Commerc
Act" (Isb. Br. 148), and the Department of Justice o
the ground that "Section 17 * * * parallels the pro
hibition on 'unjust discrimination' in Section 2 o
the Interstate Commerce Act" (D. J. Br. 29). Ever
one of the cases cited (Isb. Br. 150–151), except fo
four of no discernible relevance,[33] rests exclusively
on Section 2 of the Interstate Commerce Act. *Wigh*
v. *United States*, 167 U. S. 512, 518; *Int. Comm*
Comm. v. *Del. & L. & W. R. R.*, 220 U. S. 235, 252-
254; *Int. Com. Comm.* v. *Balt. & Ohio R. R.*, 225 U. S

[33] *Louisville & Nashville R. R.* v. *Mottley*, 219 U. S. 467, an
Chi., Ind. & L. Ry. Co. v. *United States*, 219 U. S. 486, held
that free passes could not be issued in settlement of claims o
in payment of advertising; they rested on that part of Sec
tion 6 (7) of the Interstate Commerce Act forbidding "
greater or less *or different* compensation," which is not foun
in the Shipping Act. *United States* v. *Illinois Central R. R.*
263 U. S. 515, upheld an I. C. C. determination that it wa
unjustly discriminatory to give preferred lumber rates t
communities which could reach the market over other lines
Fourche R. R. Co. v. *Bryant Lumber Co.*, 230 U. S. 316, held
that the prohibition against rebates forbade freight rebates i
payment for land purchased.

326, 342; *Seaboard Air Line Ry. Co.* v. *United States*, 254 U. S. 57, 62.

The early drafts of the Shipping Act carried over Section 2 of the Interstate Commerce Act in only slightly rephrased form, H. R. 17328, 63d Cong., and H. R. 450 and 14377, 64th Cong. each provided in Section 4, First, that it was unlawful—

> *First:* To charge, demand, collect, or receive from any person or persons by any special rate, rebate, drawback, or other device a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property subject to the provisions of this act than it charges, demands, collects or receives from any other person or persons for doing for him or them a like service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

After hearings[34] in which this provision was heavily attacked, on the ground that it could not be applied to ocean transport (Hearings, pp. 44, 88, 127, 139–140, 173, 183), and only weakly defended (pp. 27–28), it was eliminated by the House Committee. With its elimination of Section 4, First, the Committee eliminated also the whole basis of respondents' argument.

B. THE UNAPPROVED DUAL RATE SYSTEMS

Isbrandtsen makes repetitive complaint that about 62 conferences are employing dual rate systems which have not specifically been approved by the Board (Isb.

[34] Hearings Before House Committee on Merchant Marine and Fisheries on H. R. 14377, 64th Cong., 1st Sess., Apr. 13–22, 1916.

Br. 10–11, 55–56, 63, 79–84).[35] We by no means agree that there are 62 unapproved systems; the count could be made only after detailed investigation of the file and proceedings in connection with each conference. But in any case this aspect of the dual rate problems quite obviously has nothing to do with the issues of this case. We consider, however, that the Court might more satisfactorily put the issue to one side if it were aided by a sober statement as to its nature.

The Board and its predecessors have in the past not required special approval as a prerequisite to the inauguration of dual rate systems under Section 15 in the view that these were subsidiary to the basic agreements. See *Section 15 Inquiry*, 1 U. S. S. B. 121 (1927).

The decision in *Isbrandtsen Co.* v. *United States*, 96 F. Supp. 883 (S. D. N. Y., 1951), aff'd by equally divided Court; 342 U. S. 950 (1952), indicated, however, that a dual rate system might be invalid because of an unreasonable differential between the two rates. Also, the Board was at about this same time in the course of evolving a series of rather exacting standards under which some dual rate systems would be

[35] Isbrandtsen again misquotes (this time at Isb. Br. 141) the monograph of the Attorney General's Committee on Administrative Procedure (1940), and the Board must again supply the omitted words, in the Committee's observation on the predecessors of the present Board that—

"Despite the comprehensive regulatory powers conferred upon the Shipping Board by the act of 1916, the Board (*as distinguished from its successor, the present Commission*) throughout its existence failed to interest itself in the vigorous exercise of those powers."

approved and others would not (see F. M. B. Br. 71–73).

Accordingly the Board in November 1952 promulgated General Order 76 (46 C. F. R. Sec. 236) which required broadly that all conferences then using, or proposing to inaugurate, contract rate systems, or to increase the rate differential of an existing system, file the contract form and statements showing (a) the reasons for using the system, (b) the amount of the differential, (c) the reasons for that amount. The respondent Conference's filing under G. O. 76 is shown in the record (R. 153–82). With this information on file, the Board had the basic data with which to examine each of the contract rate systems then in effect.

In 1954, in *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51 (C. A. D. C. 1954); cert. den., 347 U. S. 990, the courts for the first time held that specific Board approval is necessary for each contract rate system. See also *River Plate & Brazil Conf.* v. *Pressed Steel Car Co.*, 124 F. Supp. 88 (S. D. N. Y., 1954), aff'd 227 F. 2d 60 (C. A. 2, 1955); *Pacific Westbound Conf.* v. *Leval & Co.*, 208 Ore. 390, 269 Pac. 2d 541 (1954), cert. den., 348 U. S. 897.

There has, however, throughout this period been a vigorous campaign by the Department of Justice and Isbrandtsen Co. to have the dual rate system declared invalid *per se*. Its outcome will turn upon the decision of the Court in this case. The Board has not considered it either prudent or possible to undertake a wholesale investigation on its own motion into each of the trades using the contract rate system until the threshold issue of validity *per se* has been settled. It

would require an exceedingly large investment of the Board's manpower, and would unsettle many stable trades, when possibly the whole inquiry would, in the event of an adverse decision by this Court, be bootless.

The Board, while temporarily leaving the status quo unchanged, has required that all new contract rate systems be specifically approved[36] before their inauguration. *Contract Rates—North Atlantic Cont'l. Frt. Conf.*, 4 F. M. B. 98, 102, 105–106 (1952). The Board in addition has entertained all complaints by parties in interest against dual rate systems and has set them for hearing.

In the event the Court should reverse the court below, as the Board is confident it must, then the Board will inaugurate procedures by which each of the contract rate systems now in operation, and not heretofore approved, will be subjected to the Board's examination and in consequence either approved or disapproved. It has considered it wiser to await such guidance as may be derived from the opinion of this Court before crystallizing the precise procedure by which this formidable task will be undertaken.

V. THE BOARD IS NOT BARRED FROM APPROVING AGREEMENTS RELATING TO SHIPPER CONTRACTS

Isbrandtsen urges (Br. 155–157), without support from the Department of Justice, that the Board cannot approve a contract rate system because such a

[36] Or, prior to *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51 (C. A. D. C.), cert. den., 347 U. S. 990, that they be set for hearing as to their validity.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~739~~ 973

FEDERAL MARITIME BOARD, *Petitioner,*

v.

ISBRANDTSEN COMPANY, INC., UNITED STATES OF AMERICA and SECRETARY OF AGRICULTURE, *Respondents.*

No. ~~740~~ 974

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE, *et al.*, *Petitioner,*

v.

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, ISBRANDTSEN COMPANY, INC. and EZRA TAFT BENSON, SECRETARY OF AGRICULTURE, *Respondents.*

BRIEF OF RESPONDENT ISBRANDTSEN COMPANY IN RESPONSE TO PETITIONS FOR WRITS OF CERTIORARI AND REQUESTING THAT THE JUDGMENT OF THE COURT OF APPEALS BE AFFIRMED.

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system involves contracts with shippers who are not carriers by water, while Section 15 relates only to contracts between carriers by water. The argument does not merit serious attention.

Section 15 very clearly contemplates that approved agreements may be effectuated by separate contracts or agreements with shippers. An agreement "fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations or other special privileges or advantages" can only be carried out by means of separate agreements with shippers in which the rates, fares, accommodations, privileges, or advantages are actually put into effect. Without such separate agreements with shippers the agreement by the common carriers could have no practical effect.

If anything has been settled in this much-litigated field, it is that conference agreements to institute the dual-rate system by contracts with shippers are subject to the jurisdiction of the Board under Section 15. *Far East Conference* v. *United States*, 342 U. S. 570; *U. S. Navigation Co.* v. *Cunard*, 284 U. S. 474; *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51 (C. A. D. C., 1954), cert. den., 347 U. S. 990.

Isbrandtsen's final argument, that the Board cannot grant such approval because Section 15 would thereby be rendered unconstitutional, as an unlawful delegation of legislative authority and as a violation of the Fifth Amendment (Isb. Br. 157–162) does not in our view call for reply.

CONCLUSION

For the reasons advanced in our main brief and herein, the judgment of the court below should be reversed.

Respectfully submitted.

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NOVEMBER 4, 1957.

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NOS. ~~739, 740~~

In the Supreme Court of the United States

OCTOBER TERM, 1956

FEDERAL MARITIME BOARD, PETITIONER

v.

ISBRANDTSEN COMPANY, INC., ET AL.

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES AND THE SECRETARY OF AGRICULTURE

J. LEE RANKIN,
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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 739

FEDERAL MARITIME BOARD, PETITIONER

v.

ISBRANDTSEN COMPANY, INC., ET AL.

No. 740

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES AND THE SECRETARY OF AGRICULTURE

These petitions seek review of a decision of the Court of Appeals for the district of Columbia Circuit which set aside an order of the Federal Maritime Board, under Section 15 of the Shipping Act, 1916 (39 Stat. 733, 46 U. S. C. 814), approving the institution of a "dual-rate" system by a conference

of ocean steamship carriers. Under the system, shippers who refuse to sign agreements to patronize conference members exclusively are charged a higher rate (9½% in the instant case) for the same transportation service than shippers who sign such agreements. The court of appeals held that the dual-rate system is retaliatory and discriminatory, in violation of Section 14, Third of the Shipping Act, 1916, and that the Board therefore had no power to approve the system under Section 15 of the Act. The United States and the Secretary of Agriculture supported respondent Isbrandtsen Company, Inc. (a non-conference carrier), in challenging the Board's order in the court below.

The United States and the Secretary of Agriculture are of the view that the court of appeals correctly held that the dual-rate system is "*per se*" illegal under the Shipping Act, 1916, *i. e.*, illegal without regard to its effect upon competition in a particular trade. However, since the case presents an important question of federal law which has not been, but should be, settled by this Court, we do not oppose the petitions for certiorari.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

MARCH 1957.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 739

FEDERAL MARITIME BOARD, *Petitioner*,

v.

ISBRANDTSEN COMPANY, INC., UNITED STATES OF AMERICA and SECRETARY OF AGRICULTURE, *Respondents*.

No. 740

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE, *et al.*, *Petitioner*,

v.

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, ISBRANDTSEN COMPANY, INC. and EZRA TAFT BENSON, SECRETARY OF AGRICULTURE, *Respondents*.

BRIEF OF RESPONDENT ISBRANDTSEN COMPANY IN RESPONSE TO PETITIONS FOR WRITS OF CERTIORARI AND REQUESTING THAT THE JUDGMENT OF THE COURT OF APPEALS BE AFFIRMED.

STATEMENT OF POSITION

This Brief of Isbrandtsen is not necessarily opposed to the momentary granting of the Conference Petition for the sole purpose of affirming the Judgment of the Court below. See *Sword Line* v. *United States*, 351 U. S. 976 (1956); *Gibson* v. *Phillips Petroleum Co.*, 352 U. S. 874. Although there have been no substantial reasons stated for the granting of either Petition, Isbrandtsen is primarily interested that there be a final and conclusive ruling by this

Court on the illegality of the so-called exclusive-patronage system, in order to terminate once and for all litigation that has persisted for approximately ten years. Petitioners have presented no sound basis for attacking the decision of the Court of Appeals, which decision is thoroughly dispositive of each of Petitioners' present arguments. The purpose of this Brief is to show that Petitioners have no chance of succeeding on the merits, and that this Court should not be compelled to grant a full-scale Review, but that jurisdiction should be obtained only long enough to affirm the Judgment of the Court below, without any further argument or proceedings.

OPINION BELOW.

Petitioners, the Federal Maritime Board and the Japan-Atlantic and Gulf Freight Conference have applied for writs of certiorari to review a Judgment of the United States Court of Appeals for the District of Columbia Circuit. The Opinions below are set forth in the Appendix to each Petition.

JURISDICTIONAL STATEMENT.

The Judgment of the Court of Appeals was entered on November 9, 1956 (R. 251). Both Petitions for Certiorari were filed on February 1, 1957.[1] The jurisdiction of this Court has been invoked under 28 U. S. C. sec. 1254 (1) and 5 U. S. C. sec. 1040.

STATUTES INVOLVED.

The statutes and sections of the Constitution involved are the Shipping Act, 1916, as amended, 46 U. S. C. *sec. 801 et seq.*, the Constitution of the United States, Article 1, sec. 1, Article 1, sec. 8, par. 18, and Amendment V, and the Sherman Anti-Trust Act, 15 U. S. C. secs. 1, 2. The applicable statutes and sections of the Constitution are set forth in Appendix A to this brief.

[1] This Brief by Respondent Isbrandtsen Company, Inc. is addressed to the Petitions for Certiorari in both No. 739 and No. 740.

COUNTERSTATEMENT OF THE CASE.

A. PROCEEDINGS BEFORE THE FEDERAL MARITIME BOARD

The "Statement[s] of the Case" as set forth in the Petitions herein are so one-sided and incomplete that Isbrandtsen feels compelled to make its counterstatement in more detail than it would desire.

The conference practice under review, which the Court of Appeals has by its decision below condemned as illegal, is the so-called exclusive patronage contract non-contract dual rate system (hereinafter sometimes referred to as the exclusive-patronage system) under which common-carrier members of a steamship conference, acting in concert, charge one set of rates to shippers who agree to ship all of their cargo exclusively on the vessels of the Conference lines, and to charge a higher set of rates for identical transportation services to shippers who do not enter into such exclusive-patronage contracts, the admitted and avowed purpose of said system being the elimination of the competition of independent, non-conference carriers and the monopolization of the trade for Conference lines.

For purposes of presenting the issues of law in the simplest form, Isbrandtsen proposed a stipulation to limit the facts to those "existing in the administrative record as found by the Board itself" (R. 229-234),[2] even though the Board's decision was in favor of the use of the System by the Conference and even though Isbrandtsen had contested the validity of several of the facts so found by the Board. Isbrandtsen admitted the findings of fact in the Board's Report, *arguendo*, for purposes of presenting the fundamental legal issues. The essential characteristics of the exclusive patronage system—upon which the Court of Appeals based its decision of fundamental illegality—stand conceded by the Board's Report.

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[2] References herein are to the appropriate pages of the Transcript of Record as filed with this Court. All emphasis in quotations has been supplied.

Respondent, Isbrandtsen Company Inc., is an American-flag carrier by water engaged in transporting cargo, as a part of its Eastbound Round-the-World Service, from Japan, Korea, and Okinawa to ports on the Atlantic Coast of the United States. Isbrandtsen, by its own choosing, has maintained a policy of not entering into agreements with other carriers concerning the fixing or regulating of transportation rates or fares or concerning the controlling, regulating, preventing, or destroying of competition. It is the only non-conference line operating in this particular trade, and has been since the end of the Second World War (R. 25).

In the freight service from Japan, Korea and Okinawa to the Atlantic Coast of the United States, Isbrandtsen competes for cargo directly with Petitioner, the Japan-Atlantic and Gulf Freight Conference (hereinafter "the Conference"), a private association of seventeen common-carrier steamship lines, having its principal office in Japan. The Conference is composed of twelve foreign-flag lines (eight of which are Japanese) and five United States-flag lines (R. 23). Although, nominally, there are five United States-flag members of the Conference, two are virtually inactive in the trade having carried practically no cargo from Japan, Korea or Okinawa to United States Gulf or Atlantic Coast ports since 1949 (R. 26).

Insofar as they are active in the trade, each Conference line operates as a common carrier by water. Because the vessels of each member line of the Conference regularly call at United States ports for the discharging of cargo, the Conference lines are subject to the jurisdiction of the laws of the United States (R. 25).

The admitted and avowed purpose of the Conference is to minimize and to eliminate competition through "the establishment, regulation, and maintenance of agreed rates and charges" (R. 139); and by the use of other devices including the exclusive-patronage system (R. 203).

The Conference and member lines thereof purport to act in concert and to operate pursuant to a conference agreement, FMB No. 3163, first approved by a predecessor agency of the Federal Maritime Board in 1934 (R. 24). This basic agreement permits the establishment and fixing of uniform rates as between conference lines, but it has never contained language authorizing, or purporting to authorize, the use of the exclusive-patronage system (R. 24). Notwithstanding this lack of approval by the Board, the Conference employed the system illegally from 1928 to 1941 and was thereby able to eliminate or suppress any *independent* or non-conference competition (R. 25).[3]

The present action stems originally from a filing by the Conference on December 24, 1952 under Rule 236.3 of the Board's *General Order 76*, 46 C. F. R. 236.3,[4] whereby the Conference proposed to employ, beginning the 30th day following the filing, the exclusive-patronage system in the Conference trade. Protests against the use of the system were timely filed by the United States Department of

[3] The Board's Report finds that "the pre-war differentials between contract and non-contract rates ranged from 12% to 66⅔% of the contract rates" (R. 25). Incredibly, the Conference gloats over this period of illegal monopolistic activities, saying that Prior to World War II, [the Conference] had employed a dual-rate system and thereby *brought about* stability of rates": (Conf. Pet., p. 4). Where there was no non-conference competition, as during this period, naturally every shipper was compelled to sign exclusive-patronage contracts in order to obtain the lower contract rates. The "non-contract rates" were, therefore, merely paper rates.

[4] After the decision of the Statutory District Court in *Isbrandtsen Company, Inc.* v. *United States*, 96 F. Supp. 883 (S. D. N. Y. 1951) aff'd 342 U. S. 950 (1952), holding that a differential between contract and non-contract rates which was arbitrarily adopted was necessarily unjustly discriminatory, the Board promulgated General Order 76, 17 F. R. 10175, C. F. R. 236 (Nov. 10, 1952), requiring in substance that Conferences using or seeking to use the system state the basis of the spread and the reasons for the use of the system in the particular trade. Such a filing has never been considered to constitute the filing of an agreement for approval of the use of the system.

Justice and by Isbrandtsen, and a hearing was requested to be held before the issuance of any order that the system could go into effect (R. 20). The Board by its Order of January 21, 1953 refused to stay the institution of the system and granted a hearing on the protests only *after* the system would have become effective (R. 21, 214). Isbrandtsen filed a Petition for Review of the Board's Order in the Court of Appeals for the District of Columbia Circuit on January 22, 1953, and the Court granted on the same day Isbrandtsen's application for a temporary stay of said Order (R. 21). On March 23, 1953, the Court of Appeals granted an interlocutory injunction against that part of the Board's Order of January 21 which purported to approve the institution of the exclusive patronage system. *Isbrandtsen Company, Inc.* v. *United States*, 211 F. 2d 51 (1954). Petitions for Certiorari filed by the Conference and the Board were denied by this Court. *Japan Atlantic and Gulf Freight Conference, et al.* v. *United States*, 347 U. S. 990 (1954).

At the hearings before the Board's Examiner, during the period between October 5 through December 23, 1953, the United States Departments of Justice and Agriculture and Isbrandtsen appeared in opposition to the proposed system. The original Recommended Decision of the Examiner was dated September 13, 1954 (R. 22). On motion of Isbrandtsen, the Department of Justice and the Board's Public Counsel, the proceeding was remanded to the Examiner by the Board's Order dated October 6, 1954, "with instructions to prepare supplemental findings of fact as to the basis of the spread between contract and non-contract rates and as to the reasonableness of the exclusive patronage contracts proposed for use in the trade, and with instructions to show the ruling upon the findings of fact and conclusions of law proposed by the parties" (R. 22).[5]

[5] The Original Recommended Decision of the Examiner comprised less than 23 pages, and contained not a single reference or single ruling upon the 413 Proposed Findings of Fact or 43 Conclu

Contrary to the specific provisions of Sections 14, 15, 16 and 17 of the *Shipping Act, 1916*, as amended, 46 U. S. C. 812, 814, 815, 816, prohibiting, among other things, "deferred rebates", retaliatory, discriminatory, prejudicial or unfair practices and other practices detrimental to the Commerce of the United States, the Board's Report, served December 14, 1955, purported to authorize the institution of an exclusive patronage system by the Conference, effective January 1, 1956, whereunder the Conference would maintain two levels of rates, *viz.*, the "contract rates" and the higher "non-contract rates", the sole consideration for the enjoyment by a shipper of the lower contract rates being the agreement of the shipper to patronize the Conference lines exclusively, and the sole reason for the exaction of the higher non-contract rates being the refusal of the non-contract shippers to sign exclusive-patronage contracts with the Conference.

In adopting the 9½ per cent differential between contract and non-contract rates, the Conference had no cargo statistics or surveys which it considered (R. 33). The non-contract rates would have been arbitrarily fixed at a level 9½ per cent higher than the contract rates (R. 20). Although the Conference had not determined what rates it would establish under the exclusive-patronage system, and, therefore, the Board had no specific rates before it, in approving the system, both the contract rates and the non-

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sions submitted by the Parties. In his Supplemental Findings, in response to the Board's direction to state the basis for the 9½ per cent differential between contract and non-contract rates, the Examiner categorically answered that, "No basis for the spread or differential exists beyond the declarations of the Conference or its officers." The Board had previously in *Contract Rates-North Atlantic Continental Freight Conference*, 4 F. M. B. 355, 371 (1954) stated that:

> "Of course, the validity of the differential between contract and non-contract rates cannot depend upon the mere declarations of its proponents. . . ."

contract rates were to be charged for precisely the same transportation service and all incidents of carriage, there being no difference in cost or value, or in any other respect, between the service offered contract shippers and that offered non-contract shippers for identical cargo movements (R. 35).[6]

In order further to coerce the shippers and to effectuate a complete and permanent monopoly in the trade, the exclusive-patronage contract, as "approved" by the Board, provided that in the event a contract shipper should patronize a non-conference vessel operating in the trade, the shipper would become liable to a penalty of 50 per cent of the freight which he would have paid at conference contract rates had the shipment moved on a conference line (R. 36).[7] The exclusive-patronage contract, moreover, would be entered into for an indefinite period of time—forever! (R. 35). This "fire system" is intended to crush and eliminate the independent competition of Isbrandtsen, thereby allowing the Conference to enjoy a complete and perpetual monopoly in the trade and to charge such rates as the conference lines may wish.

The economic coercion of the Conference is further aided by the fact that the conference lines collectively furnish

[6] The Board expressly found that:

> "There would, under the dual rate system, be no difference in cost or value of service rendered to two shippers, one of which is a contract signatory and the other of which is not a contract signatory, although the cargoes of each might be identical and identically destined." (R. 35).

[7] It is important to note that whereas conference agreements authorized by Section 15 of the Shipping Act, 46 U. S. C. sec. 814, may contemplate elimination of competition *only among* member lines of the particular Conference, the principal purpose of the exclusive-patronage system is to eliminate and perpetually to suppress *non-conference or independent* carriers. This predatory purpose has been frankly admitted by the Board on various occasions. See Appendix C, *infra*.

over 300 sailings a year as compared with only 26 sailings yearly (approximately fortnightly) by Isbrandtsen (R. 27). Many shippers in the trade require more than two sailings each month (R. 35). Various Conference lines also furnish certain special facilities, such as refrigerated space and silk rooms, which Isbrandtsen does not provide (R. 35). Furthermore, Isbrandtsen does not serve certain ports, such as Gulf ports, which the Conference lines serve (R. 35). Shippers who would have to rely on Conference vessels for part of their service would be economically coerced into signing exclusive-patronage contracts with the Conference and would be prevented from patronizing or using the service of Isbrandtsen (R. 35).[8]

The Board specifically found that most of the Conference vessels commence loading inbound cargo for the United States at the Philippines, proceed then to Hong Kong and complete loading in Japan, and that they discharge such cargo at Pacific, Gulf and Atlantic ports of the United States (R. 25). The principal inbound cargo of Isbrandtsen has been loaded at Japan and the Philippines (R. 26). From 1950 to the present, Isbrandtsen has offered an approximately fortnightly service from Japan and the Philippines to Pacific and Atlantic Coast ports of the United States (R. 27). The Conference lines collectively during the year 1953 offered approximately 300 sailings from

[8] The Board in its Report admits the tremendous economic coercion which would be enjoyed by the Conference (R. 35):

> "Isbrandtsen's carryings, if a dual rate system were put into effect in this trade, would be limited by the lack of reefer space and special silkrooms on Isbrandtsen vessels and by the limited frequency and range of service of those vessels. Shippers of dry cargo destined for Gulf ports, shippers of reefer cargo, and shippers requiring more than two sailings per month would practically *have no choice* between the Conference and Isbrandtsen's service as presently constituted."

Japan and approximately 250 sailings from the Philippines (R. 27).[9]

The sailings and percentage carryings of the Conference in the trade from Japan have increased substantially each year since 1950 without the use of the exclusive-patronage system (R. 27). The Petitions of both the Board and the Conference emphasize the relative participation between Conference vessels and the vessels of Isbrandtsen in the carriage of Japanese cargo, giving the implication that Isbrandtsen was carrying large percentages of this cargo movement in comparison with the Conference members. (Bd. Pet. p. 6; Conf. Pet. p. 5). The conclusion proffered by the Board and the Conference is most patently illusory. The trade from the Philippines and Japan to the Gulf and Atlantic Coasts of the United States is actually one trade participated in by all carriers, as the Board's Report finds (R. 25, 26). Isbrandtsen has been virtually excluded from Philippine cargo by use of the exclusive-patronage system in that trade.

When the overall trade from the Philippines, Hong Kong, and Japan is considered, the Conference lines have carried more cargo on each average sailing than Isbrandtsen. For example, taking the last full year of record, 1952—long before the Conference started the Rate War—each Conference vessel carried an average of 4700 tons per sailing from the Philippines as against only 1007 tons carried by Isbrandtsen (R. 27). In addition, the Conference loaded cargo at Hong Kong, from which port Isbrandtsen carried no cargo (R. 27). Thus, the Conference vessels loaded substantial inbound cargoes, before ever calling at Japan, in trades where Isbrandtsen is virtually excluded from participation because of the use of the exclusive-

[9] Conference sailings for the full year 1953 are estimated on the basis of figures in the record for the first six months of that year. During the first six months of 1953, the Conference had 153 sailings from Japan and 127 sailings from the Philippines.

patronage-contract system. The figures show conclusively that there has been *no* gradual encroachment by Isbrandtsen in the carryings of the Conference—*the situation has been, in fact, the reverse.*

The trade from Japan to the North Atlantic is presently overtonnaged (R. 27). This overtonnaging problem was made serious by the re-entry of Japanese lines into the trade, which lines carried only 15 per cent of the total cargo in 1951, but 66 per cent of the total movement in the first six months of 1953 (R. 28).[10] United States-flag participation, *including that of Isbrandtsen,* fell from 53 per cent in 1950 to only 21 per cent in the first six months of 1953 (R. 28).

As stated above, Isbrandtsen has chosen not to join steamship conferences having for their purpose the fixing of rates between member lines and the elimination of competition. It has considered that it had the right to be free from such entangling alliances with other carriers, who as a normal business practice should be its competitors. Neither the Board nor the Conference seem willing to recognize the right of such free enterprise, and imply that certain insidious motives are to be attributed to any carrier who would not join the Conference (Bd. Pet. p. 5; Conf. Pet. p. 5).

The reasons for Isbrandtsen's refusal to join the Conference and to relinquish its business independence to the concert composed of predominantly foreign-flag carriers are readily apparent. The Conference carriers themselves have not maintained the rates they have agreed upon, and an American-flag carrier, such as Isbrandtsen, who would choose to abide by any agreements it may enter, would in many instances be charging the highest rates in the trade. The evidences of this illegal Conference activity are set forth in the Board's Report. For example, during October

[10] The Board found that there "is a tendency on the part of Japanese shippers to favor Japanese lines, . . ." (R. 29).

1952, the Conference discussed "strong rumors and indications that some member lines were not adhering to tariff rates and regulations" and formally brought the matter to the Japanese Ministry of Transportation (R. 28). The Japanese Ministry of Transportation issued a warning to each Conference line against these malpractices and the secret rebating (R. 28).

Conference rates, except for the secret and illegal rebating above referred to, and the rates of Isbrandtsen remained stable and constant for relatively long periods of time prior to the rate war started by the Conference in March 1953 (R. 29). Shippers testified as to the lack of success, prior to the rate war, "in their efforts to convince the Conference to reduce the level of rates on various commodities" (R. 30).

In March 1953, the Conference rejected a proposal of a member line to meet Isbrandtsen's competition by lowering its tariff rates (R. 30). The Conference instead voted on March 12, 1953 (after the Court of Appeals had granted the Stay referred to above, against the use of the system) to "open" rates on ten of the major commodities in the trade (R. 30). The Conference subsequently opened rates on most commodities which move in substantial volume in the trade (R. 30). The Board found that the decision to start the rate war was directed at non-conference competition and also *at the secret "rebating" by Conference lines* (R. 31). It is frankly stated by the Board that the Conference, in starting the rate war,

> "hoped that the rate war would lead to Isbrandtsen's joining the conference or to the institution of the dual rate system or other system" [either of which occurences would have given the Conference an absolute monopoly]. (R. 31)

Immediately after the outbreak of the rate war, rates fell to less than out-of-pocket handling costs (R. 31). In May 1953, Isbrandtsen instituted minimum compensatory

rates below which it would not go to secure cargo (R. 34). Isbrandtsen gave public notice in the trade of its desire to apply reasonable rates, which practice the conference lines refused to adopt (R. 31).

The rate war instituted by the Conference was extremely detrimental to the commerce of the United States, and many shippers requested the Conference to end its deleterious practice (R. 32).

The exclusive-patronage system is basically a device conceived for the precise purpose of evading the specific proscriptions of the Shipping Act of 1916. It has no place in the promotion of the foreign commerce of the United States, and it is not consonant with the interests of the shipping public. The pious plea that it is needed to promote "stability of rates"—a plea presented throughout the Petitions of the Board and the Conference—constitutes the most meaningless verbalization. The exclusive-patronage system will neither increase cargo movements in United States foreign commerce, nor will the lack of the system stifle any movement. As a matter of fact, as the Conference Petition admits (Conf. Pet., p. 8), during recent months in the Conference trade, the cargo movement has been extraordinarily heavy and rates have been maintained at remunerative levels—all without use of the assailed system.

B. PROCEEDINGS IN THE COURT OF APPEALS.

The Board's Report, approving the institution of the exclusive-patronage system as of January 1, 1956, was not served upon the public until Friday, December 14, 1955 (R. 19). This Report at the time of service was not accompanied by an Order as is usual in administrative adjudicatory decisions. Because of the shortness of time before the system would have become effective (a large part of which was the intervening Holiday season), and because the Report did not even specify whether the system would become effective as of Tokyo time or Washington, D. C. time (the

former being one and one-half days earlier), Isbrandtsen was compelled to file its Petition to Review promptly with the Court of Appeals, asking for a temporary stay of the Board's Report (R. 2).

On the day of the filing of the Petition to Review, December 19, 1955, Isbrandtsen's attorney delivered a letter to the Board, calling the Board's attention to the filing of its Petition, which was also delivered, and to various formal deficiencies in the Board's Report, including the lack of an accompanying Order (R. 85).

The Board, on December 21, 1955 (seven days after service of its Report), served its First Order in the administrative proceeding, specifying, *inter alia*, that the system was approved "effective January 1, 1956, at 12:00 noon Eastern Standard Time" (R. 73). On January 11, 1956, the Board served its *Second* Order, eleven days after the system would have become effective according to the Board's original Report (R. 75).[11]

In the original Report, the Board stated that, "we disapprove the [exclusive-patronage] contract form insofar as it purports to cover F. O. B., or F. A. S. sales" (R. 65). The first Order of the Board reaffirmed the approval of the system effective January 1, 1956, "excepting that said contract system shall not apply to shipments which are made on an F. O. B., F. A. S., or ex godown bases or to the transportation of cargoes in refrigerated compartments" (R. 74).

The second Order of the Board, served on January 11, 1956, apparently attempted to accomplish a major and fundamental change in the exclusive-patronage contract, by stating that the system would not apply to F. O. B. or F. A. S. shipments "unless the person whether seller or buyer named as shipper in the ocean bill of lading is a

[11] Isbrandtsen's Petition to Review was amended so as to include review of the Board's Supplemental Orders.

contract signatory" (R. 76). The language of the second Order has remained a continuing mystery to Isbrandtsen, and there were no findings whatsoever, either in the Report or in the Supplemental Order, to support what was apparently a new conclusion. Isbrandtsen, therefore, filed a Motion with the Court of Appeals below to remand the second Order of the Board for a proper recitation of the circumstances and reasons prompting it and for proper findings of fact pursuant to the requirements of the Administrative Procedure Act (R. 77). The Court below finally declared this Motion to be moot, in view of its decision holding the system to be illegal.

The Petition to Review named the United States and the Federal Maritime Board as Respondents (R. 2). The United States, represented by the Attorney General, was the statutory Respondent under 5 U. S. C. sec. 1037. The Federal Maritime Board was added as a Respondent, pursuant to a Rule of the Court of Appeals. The Department of Justice joined Isbrandtsen in attacking the validity of the Board's Orders and the legality of the exclusive-patronage system. Thereafter, the Secretary of Agriculture, one of the largest shippers in the foreign commerce of the United States, intervened in support of Isbrandtsen's position, and the Japan-Atlantic and Gulf Freight Conference intervened as a Respondent-Intervenor in the support of the Orders of the Board. Oral argument was had before the Court on May 19, 1956.

The Judgment of the Court of Appeals was entered on November 9, 1956 (R. 251). In the opinion by Fahy, J., the Court unanimously held that the exclusive-patronage system was fundamentally unlawful and in violation of Section 14, Third of the Shipping Act of 1916. Specifically, the Court held that:

> "Since the dual-rate system here constitutes retaliation it must be condemned without regard to the question of reasonableness, as are deferred rebates" (R. 246); and

"We think it clear not only that the liquidated damage provision is discriminatory but that a 9½ per cent differential for exactly the same service and facilities is of like character." (R. 249)

Washington, J., "fully concur[red]" in Judge Fahy's opinion. He offered, however, certain additional observations, concurred in by the entire Court, among which were the following:

"In the first place, it seems clear that in actual practice the contract system is being used to penalize a shipper because he has patronized another carrier, or at least reserved the right to do so. Is this 'retaliation' proscribed by the Act? Certainly there seems no reason to limit 'retaliation' to the dictionary definitions of 'returning like for like' or 'evil for evil' which have been selected by the Board. The very example used by the statute, boycotting for use of another carrier, is not 'like for like' nor are the boycotting carrier or group of carriers necesarily imbued with ideas of doing evil. But detriment to the independent shipper and the independent carrier plainly results."

"Are these contracts, then, the sort of 'discriminating or unfair methods' that the statute sought to anticipate? That the contract system comes within the literal meaning of this phrase is clear. As the Supreme Court observed in *Swayne and Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 303 (1937), a contract system under which different prices are charged for the same transportation of identical cargoes to identical ports under identical circumstances is 'prima facie discriminatory' [footnote omitted]. Nevertheless, the Board urges that the literal meaning of the statute should not be followed." (R. 250, 251).

Because the Court below found that the exclusive patronage system was unlawful under Section 14, Third of the Shipping Act, it did not discuss the various other questions of illegality raised by the Petition to Review, which Is-

brandtsen considers to be equally as formidable objections to the system as the violation of Section 14, Third of the Shipping Act.

QUESTIONS PRESENTED TO THE COURT OF APPEALS.

1. Whether the employment of the so-called exclusive patronage contract/non-contract dual rate system, under which common-carrier members of a steamship conference acting in concert, charge one set of rates to shippers who agree to ship all their cargo exclusively on the vessels of the conference lines, and charge a higher set of rates for identical transportation services to shippers who do not enter into such exclusive patronage contracts is unlawful under, or in violation of sections 14, 15, 16, and/or 17 of the Shipping Act, 1916, so that the Federal Maritime Board under section 15 of said Act, lacks authority to approve an agreement, understanding or arrangement entered into by the members of such a conference for the use of such a system?

2. Whether such a system violates the various provisions of the Anti-Trust laws or any other pertinent statutes, including the question whether the system could ever be legally approved under section 15 of the Shipping Act, because that section can exempt from the Anti-Trust laws only agreements between carriers and "other persons" subject to the Act, whereas the fundamental part of this system is a so-called exclusive patronage contract between conference lines and shippers, who are neither carriers nor "other persons" subject to the Act.

3. Whether the Board could, in any event, approve the use of the exclusive-patronage-contract-dual-rate system in the particular trade herein involved on the basis of the facts existing in the administrative record as found by the Board itself?

4. Whether the Board, in approving such a system under section 15 of the Shipping Act even assuming the legality

of such a system, must have before it a clearly stated "agreement" or "understanding" between the common carriers involved, including the actual rates which would be charged by such conference carriers pursuant to their concerted action?

5. If section 15 of the Shipping Act, 1916, should authorize the Board to approve such a system, whether such section of the Act would thereby be rendered unconstitutional under the "Due Process" clause or other provisions of the Constitution by reason of the fact that it would give the Board and/or Conference the power to force the independent carrier or carriers either out of the trade or into the conference and/or permanently prevent independent competition from entering the trade by making non-conference competition economically impossible?

The Court of Appeals found it unnecessary to go beyond the issues in Question 1, in view of its holding that the system was fundamentally illegal under Section 14, Third of the Shipping Act. Even under this question the Court below did not decide the serious challenge of illegality under Sections 15, 16 and 17 of that Act. We stress to this Court the importance of those remaining issues under Question 1, as well as the importance of the issues raised in the succeeding questions, particularly questions 2 and 5.

SUMMARY OF ARGUMENT.

INTRODUCTION.

The controversy here concerns only the exclusive-patronage system and not the Conference system as such. The Court below has passed upon only the single issue of illegality under Section 14, Third of the Shipping Act. The system is subject to equally serious objections of illegality, however, even if it were able to pass muster the proscriptions of Section 14, Third; *viz.*, it would be unjustly discriminatory in violation of Sections 15, 16, and 17 of the

Shipping Act. Furthermore, the system could never be legally approved because it involves an agreement with shippers who are not "persons" subject to the Shipping Act, and who cannot consequently receive any immunity from the Anti-trust Laws. Should the Board's interpretation of the Act be held valid, Section 15 of the Act would be rendered unconstitutional. The facts on which the challenges of illegality are based are conceded by the Board's Report.

I

The most striking feature of the Petitions is the lack of any substantial reasons why the Writs sought should be granted. In the first place, there has been no proven public interest in favor of the system. Secondly, and more importantly, Petitioners have no chance of prevailing before this Court on the substantive merits. Although technically there are no real grounds for granting the Petitions, Isbrandtsen is primarily interested that this Court affirm the Judgment of the Court below, because of the proven reluctance of the Board to accept decisions of the lower Courts pertaining to this matter. The Court of Appeals has considered all of Petitioners' present arguments and has carefully analyzed and thoroughly disposed of each of the contentions now or heretofore raised in support of the system. Nothing remains to be said! Under these circumstances, this Court should not be compelled to hear further arguments, and the only review to be granted should be the momentary granting of the Conference Petition, for the sole and immediate purpose of affirming the Judgment of the Court of Appeals, without any further argument or proceedings.

II

The Court of Appeals correctly held that the system contravenes Section 14, Third of the Shipping Act, and

Petitioners have not even undertaken to dispute the real basis of the Court's reasoning. It is difficult to imagine a clearer case of retaliation or "resort to other discriminatory or unfair methods" against a shipper, "because such shipper has patronized [another] carrier", than the exclusive-patronage system.

III

The Legislative History of the Shipping Act offers no support to Petitioners. The Board and the Conference have traditionally relied upon a distortion of the preliminary Report of the Alexander Committee and have avoided any discussion of subsequent legislative history. It is important to recognize the status of the preliminary report of the Alexander Committee, because the portions relied upon by Petitioners are actually nothing more than a *summary of arguments*, which had been made to the Committee at the hearings, most of which were made by the Conferences themselves. The legislative history of the Act is precisely clear that Congress intended to preserve independent competition and to prevent discriminations by Conference lines against shippers. In this respect, it specifically prohibited all such exclusive-tying arrangements or unfair practices *then in use* by conferences—and the only reason that the present type of exclusive-patronage system was not condemned in *haec verba* was that *it was not then in use*. The exclusive-patronage system is in all material respects similar to the specifically outlawed exclusive-patronage-deferred-rebate system, which was then in use.

IV

The decision of the Court of Appeals herein is not in conflict with any prior decision of this Court or any other Court. It has generally been conceded, as it was by the Board's own Chairman in his recent testimony before the House Merchant Marine and Fisheries Committee, and it

is obvious from the cases, that until the decision of the Court below, there has been no definitive judicial decision on the legality or illegality of the exclusive-patronage system.

V

In addition to the basic and unavoidable illegality of the system under Section 14 of the Shipping Act, the system is fundamentally unlawful for various other reasons, which issues it was unnecessary for the Court below to meet, in view of its holding of illegality under Section 14. These additional obstacles which the system would have to overcome in order to be rendered legal are of substantial importance, and constitute further cogent reasons why Petitioners have no chance of succeeding before this Court on the merits, and why the Judgment of the Court below should be affirmed.

A. The system is necessarily and fatally illegal because it is unjustly discriminatory and unduly prejudicial in violation of sections 15, 16, and 17 of the Shipping Act, since it involves the charging of different rates to identically situated shippers for identical transportation services.

B. The Board has no discretion or jurisdiction to approve the system because it involves as its main and most essential ingredient an exclusive-patronage contract entered into between common carriers and shippers, the latter parties not being "persons" subject to the Shipping Act nor subject to any immunity which may be given by the Board, pursuant to Section 15 of the Act, from the Anti-trust Laws.

C. The Board's interpretation of the Act would render Section 15 of the Act unconstitutional as an unlawful delegation of legislative authority, and because it would deprive Isbrandtsen and other carriers—particularly "tramp" carriers—of property without due process of law. The Board's interpretation would confer upon the Conference, a private cartel, the absolute power to ex-

clude any independent carrier, whether a common or contract carrier, from the trade unless the independent joined the Conference. Contract carriers could never join, however, because they are not subject to the Shipping Act, and would have to become common carriers or retire from business. This would be the equivalent of giving the private monopoly the power to issue certificates of public convenience and necessity, with no statutory guide for their issuance.

ARGUMENT

The controversy here is the so-called exclusive-patronage system, not the Conference system as such. Isbrandtsen has raised no issue with respect to any particular rates set by the Conference so long as they apply equally and uniformly to all shippers without the invidious discriminations inherent in exclusive-patronage arrangements. Thus, the case does not involve a dispute concerning uniform conference rates established by the Conference pursuant to its rate-making authority under its basic conference agreement.[12]

The Court below has passed upon only the single issue of illegality under Section 14, Third of the Shipping Act. The exclusive-patronage system, however, is subject to equally serious objections of illegality even if it were able to pass muster the proscriptions of Section 14, Third. These other provisions of law which the system would violate are innumerable, but at least it would be unduly prejudicial and unjustly discriminatory in violation of Sections 15, 16, and 17 of the Shipping Act. Furthermore, the system could never be legally approved because the cornerstone of such system involves an agreement with persons who are not subject to the Shipping Act, and who conse-

[12] As previously pointed out, the evidence shows that the Conference lines have not adhered to their own Conference rates and regulations and have been guilty of illegal and secret rebating and other malpractices. This matter was the subject of a "warning" to each Conference line by the Japanese Ministry of Transportation (R. 28).

quently cannot receive any immunity from the Anti-trust Laws. Should the Board's interpretation of the Act be held valid, Section 15 would be rendered unconstitutional.

Certain Conference agreements may be permitted by Section 15 of the Shipping Act, but they can be approved by the Board *only insofar* as they are *not*

(1) unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, *or*

(2) detrimental to the commerce of the United States, *or*

(3) otherwise in violation of the Act.

Such lawful agreements, which are approved by the Board, are exempted from the Anti-trust Laws. The immunity so conferred from the Anti-trust Laws is strictly limited by the specific words of the statute.[13]

[13] Under familiar rules of statutory construction, it is established that the creation of a specific exemption in a statute negatives any implication that other and broader exemptions were intended by the legislature. *Bend* v. *Hoyt*, 13 Peters, 171-172; *Equitable Life Association* v. *Clements*, 140 U. S. 226. It is also a well established principle that courts do not favor repeals by implication. *United States* v. *Borden Co.*, 308 U. S. 188, *General Motors Company* v. *United States*, 286 U. S. 49, 61-62; *Henderson's Tobacco*, 11 Wall. 88-92; *Pasadas* v. *National City Bank*, 296 U. S. 497, 503-505. Immunity from the application of the Sherman Act cannot be implied by reference to general legislative policy or asserted inconsistencies with other statutes but must be expressly granted. *General Motors Co.* v. *United States*, *supra*; *Henderson's Tobacco*, *supra*; *United States* v. *Tynen*, 11 Wall. 88, 92; *Pasadas* v. *National City Bank*, *supra*; *United States* v. *Barnes*, 222 U. S. 513; *Baltimore National Bank* v. *State Tax Commission*, 297 U. S. 209; *Frost* v. *Wenie*, 157 U. S. 46. The courts have uniformly applied such strict construction when considering statutory exemptions from the Sherman Act. The Capper-Volstead Act (17 U. S. C. A. secs. 291-292) was so construed in *United States* v. *Borden Co.*, *supra*, as was the Webb-Pomerene Act (40 Stat. 516, 15 U. S. C. §§ 61, 62, 65) in *United States Alkali Export Association* v. *United States*,

The astonishing nature of the departure from traditional standards of common-carrier rate-making, involved in the exclusive-patronage-contract system, is most vividly delineated by a mere summary of the salient and admitted features of the system:

(1) Two sets of rates—one of which is higher by an arbitrary differential of 9½ per cent—are charged by the *common carrier* conference lines for *precisely the same transportation service;*

(2) The sole consideration entitling a shipper to the lower "contract" rates is his agreement not to patronize —or to boycott—any non-Conference carrier;

(3) The discrimination in rates is entirely unrelated to volume or frequency of shipments—indeed, the contract shipper would undertake no obligation to ship any freight at all;

(4) The higher non-contract rates would be exacted from shippers solely because they would refuse to agree not to patronize any independent carrier;

(5) The contract shipper would be subject to severe retaliatory penalties for employing the service of an independent carrier, becoming liable for 50 per cent of the freight which he would have paid at Conference contract rates;

(6) The exclusive-patronage contract—*the key to the system*—would be entered into between the Conference lines and shippers for an indefinite period of time;

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325 U. S. 196; the Transportation Act (41 Stat. 456, 590, 49 U. S. C. A. §§ 71-78) in *United States* v. *Southern Pacific Company*, 259 U. S. 214; the Fishermen's Collective Marketing Act (15 U. S. C. A. § 522) in *Columbia River Packers' Association* v. *Hinton*, 34 F. Supp. 970; and *Manaka* v. *Monterey Sardine Industries*, 41 F. Supp. 531; and the Interstate Commerce Act (54 Stat. 898, 49 U. S. C. A. § 1) and supplementary legislation in *Georgia* v. *Pennsylvania Railroad Company*, 324 U. S. 439.

(7) Because the Conference lines collectively offer a greater and more comprehensive service, many shippers would be coerced into signing exclusive-patronage contracts; and

(8) The intended and inevitable result of the exclusive-patronage-contract system would be to monopolize the trade in the hands of the carriers employing the system.

Since 1947, it has been the relentless efforts of the United States Departments of Justice and Agriculture and Isbrandtsen which have been primarily responsible for court decisions forcing the Board to go through at least some prefunctory—though unavailing—motions in the regulation of the shipping cartels. The Board has consistently disavowed the need for regulating these steamship monopolies and has even disclaimed its power to do so,[14] contend-

[14] Although the Board had previously argued to this Court in *Isbrandtsen Company* v. *United States*, 211 F. 2d 51 (C. A. D. C., 1954), cert. denied 347 U. S. 990 (1954), that it had "plenary power over all Conference activity," including the power to "disapprove, cancel or modify any agreement" in any manner as it might deem proper and the power to "direct the conference to suspend rates under sanction of cancellation of the basic agreement," the Board has since denied this power in *Agreement Pertaining to Brokerage of Pacific Coast European Conference* (Docket 767, decided December 2, 1955). In that case, the Board found that the Conference was operating under an unapproved modification of its basic agreement—one that the Board's Regulation Office had specifically rejected—and that the carriers had deliberately adopted the modified agreement on October 5, 1954 and applied it retroactively to September 29, 1954. Not only did the Board flatly disavow any power to stop this illegal conference activity, which it had represented it had to this Court and to the Supreme Court, in the previous appeal of the Board's action in this very *Japan-Atlantic and Gulf Freight Conference* case, but it *refused to submit the case to the Department of Justice for appropriate action.* The Board stated specifically that it considered itself "to be without authority, express or implied, to suspend or stay approved or unapproved agreements between carriers." In other words, once a conference basic agreement has been approved by the Board it is inviolable and immune from further regulation.

ing, from time to time, *inter alia:* that the exclusive-patronage-contract can go into effect without opportunity for an agency hearing or protests by interested parties; that the Board is without power to prevent a Conference from instituting such a system or to suspend the system for any reason once instituted; that an exclusive-patronage-contract system does not constitute an "agreement" or "understanding" within the meaning of Section 15 of the Shipping Act and does not require Board approval; and that the Board has exclusive jurisdiction to determine whether or not it has in fact approved an exclusive-patronage-contract system. It has required several Court decisions to dispel these fantasies of the Board. *Isbrandtsen Company* v. *United States*, 96 F. Supp. 883 (S. D. N. Y., 1951), affirmed *sub nom. A/S J. Ludwig Mowinckels Rederi*, 342 U. S. 950 (1952); *Far East Conference* v. *United States*, 94 F. Supp. 900 (D. N. J., 1951), rev'd 342 U. S. 570 (1951); *Isbrandtsen Company* v. *United States*, 211 F. 2d 51 (C. A. D. C., 1954), cert. denied 347 U. S. 990 (1954); *Pacific Westbound Conference* v. *Leval*, 269 P. 2d 541 (1954); *River Plate and Brazil Conference* v. *Pressed Steel Car Company*, 124 F. Supp. 88 (S. D. N. Y., 1954), 222 F. 2d 369 (1955).

Despite the fact that the Board's procedure has been soundly criticized in both the first and second Isbrandtsen cases, and the exclusive-patronage contracts held unenforceable in *Pacific Westbound* v. *Leval*, *supra;* and *River Plate* v. *Pressed Steel Car*, *supra;* the Board's procedural deficiencies and obstructions have been responsible for so long avoiding any definitive decision on the claim of fundamental illegality.

I. THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE AFFIRMED.

For approximately ten years, Isbrandtsen has been seeking a final and definitive decision from the Courts on the illegality of the exclusive patronage system; the decision of the Court below is such a definitive decision.

The Board, as will be explained below, has shown considerable reluctance to accept the decisions of the lower Courts pertaining to this system. Although technically there are no real grounds for granting the Petitions, Isbrandtsen is primarily interested that this Court affirm the Judgment of the Court below—and without more.

The Court of Appeals, in its unanimous decision, has considered all of Petitioners' present arguments and has carefully analyzed and thoroughly disposed of each of the contentions now or heretofore raised in support of the system. Nothing remains to be said! Isbrandtsen believes that, under these circumstances, and because Petitioners have no likelihood of succeeding before this Court on the merits, irrespective of the length or nature of the review, the Judgment of the Court of Appeals holding the system illegal should be affirmed without granting any full-fledged or prolonged review, as envisioned by the Petitions.

The only review by this Court should be the momentary granting of the Petition of the Conference, for the immediate and sole purpose of affirming the Judgment of the Court of Appeals. See *Sword Line v. United States*, 351 U. S. 976 (1956), *Gibson v. Phillips Petroleum Co.*, 352 U. S. 874. In this respect, Isbrandtsen submits that the Petition of the Conference, the aggrieved party, be granted and not the Petition of the Board, which has sat as "Judge" on the original issues. Short of such momentary Review, both Petitions should be denied.

Isbrandtsen is fearful that anything less than affirmance of the Judgment below by this Court will not dissuade the

Board from attempting to pursue its stubbornly and long-held views in one or more other Circuits, thus involving interminable litigation that no private litigant could endure. The Board in the past has been quite reluctant to heed prior Court decisions involving the exclusive-patronage system. In *Isbrandtsen v. United States*, 211 F. 2d 51, cert. denied *sub nom., Japan-Atlantic and Gulf Freight Conference v. United States*, 347 U. S. 990 (1954), it was held that an exclusive-patronage system involved an "agreement between carriers" within the purview of Section 15 of the Shipping Act, and that any such agreement between carriers would require prior approval by the Board. The question of illegality of the system was never met, or indeed raised, in that case, but only the question of whether the exclusive-patronage system constituted an "agreement between carriers" under Section 15 of the Shipping Act.

Despite the clear holding in the *Japan-Atlantic* case, that prior approval of any exclusive-patronage system was necessary, in any event, the Board in the almost four-year interval has done nothing to implement the decision with respect to the sixty-two (62) other Conferences under its jurisdiction which presently use the exclusive-patronage system without any approval by the Board. The Courts, however, have not been encumbered with such hesitation, and have held the exclusive-patronage contracts unenforceable. *Pacific Westbound Conference v. Lexal*, 269 P. 2d, 541 (1954); *River Plate and Brazil Conference v. Pressed Steel Car Co.*, 124 F. Supp. 88 (S. D. N. Y. 1954).

As the Petitions admit (Bd. Pet., p. 12; Conf. Pet., p. 9), approximately 62, of the 125 Conferences subject to the Board's jurisdiction, use the exclusive-patronage system. Notwithstanding the decision of the Court of Appeals holding that these systems constituted agreements, certiorari having been denied by this Court, not one of these 62 Conferences, to Isbrandtsen's knowledge, has ever filed

for or obtained such formal Approval.[15] This strange inertia of the Board is more vividly illustrated in the correspondence between the Board and Counsel for Isbrandtsen, which has been attached hereto as APPENDIX B.

The entire position of the Federal Maritime Board in this proceeding is anomalous to say the least. From the outset of the legal attacks upon the exclusive-patronage system by the Departments of Justice and Agriculture, as well as by Isbrandtsen, the Board has been the most strenuous advocate of the Conference position. After the Board's vigorous defense of the legality of the system in several cases before the courts, *Isbrandtsen Company, Inc.* v. *United States*, 96 F. Supp. 883 (S. D. N. Y., 1951), affirmed *sub nom., A/S J. Ludwig Mowinckels Rederi*, 342 U. S. 950, 72 S. Ct. 623 (1952); *Far East Conference* v. *United States*, 94 F. Supp. 900 (D. N. J., 1951) rev'd 342 U. S. 570, 72 S. Ct. 492 (1952); *Isbrandtsen Company, Inc.* v. *United States*, 211 F. 2d 51 (C. A. D. C., 1954), cert. denied *sub nom., Japan-Atlantic & Gulf Freight Conference* v. *United States*, 347 U. S. 990, 74 S. Ct. 852 (1954)—even though the basic issue of legality was never reached prior to the instant decision of the Court of Appeals—there was little likelihood that the Board could hold an impartial hearing on these issues. The situation was, in fact, one when an advocate was sitting as the judge in its own case.

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[15] The Board's reluctance to follow the decisions of the Courts is not surprising, for it does not even follows its own decisions. It has repeatedly emphasized that the exclusive-patronage system could only be used where competitive conditions presented by non-conference carriers so warranted. *Japan-Atlantic and Gulf Freight Conference*, 4 F. M. B.—(December 14, 1955); *Trans-Pacific Freight Conference of Japan*, 4 F. M. B.—(December 19, 1955). The Affidavit of Lloyd Tribbott, Chief of the Board's Regulation Office, states that *in only ten of these 62 trades, where the exclusive patronage system is used, is there any independent competition whatsoever* (R. 133).

It is with full realization of this never-say-die attitude of the Board that Isbrandtsen presses for definitive action now by this Court. Isbrandtsen most sincerely desires an end to litigation that has lasted now for approximately a decade. It believes that the definitive action of this Court should be the *immediate affirmance of the Judgment below.*

A: The Petitions do not present adequate grounds for granting the writs.

The most striking feature of the Petitions of the Board and the Conference is the lack of any substantial reasons why the Writs sought should be granted. In the first place, there has been no proven public interest in favor of the exclusive-patronage system. Secondly, and more importantly, the Petitioners have no chance of prevailing before this Court on the substantive merits.

Petitioners have not succeeded in bringing themselves within Rule 19 of this Court. They have not submitted in their Petitions and "special and important reasons" (Rule 19, 1) for the exercise by this Court of its "sound and judicial discretion" for granting such Writs. *Rice* v. *Sioux City Cemetery*, 349 U. S. 70, 73, 77 (1954). Nor do Petitioners present any case within any of the "character of reasons" (Rule 19, 1) for which such Writs are granted.

Petitioners similarly have not succeeded in stating any "important question of federal law which has not been, but should be settled by this Court." (Rule 19 b). The direct holding of the Court of Appeals is carefully analyzed and is thoroughly dispositive of all of Petitioners' arguments. Certainly this Court should not be compelled to hear prolonged or lengthy arguments on this case, where Petitioners have no likelihood of success on the merits.

Even if "public importance" by itself could be a proper ground for the granting of the Petitions, after the case has

been thoroughly explored and decided by the Court below, Petitioners have not exhibited any public importance in support of the exclusive-patronage system. Thus, if Petitioners had been applying for the instant Writs under Rule 20 of the Rules of this Court—which they are not—covering "a case pending in a Court of Appeals *before* judgment", no case of "imperative public importance" has been made out. Of the 125 Conferences under the Board's jurisdiction less than half use the exclusive-patronage system, and only 10 of these Conferences have any independent competition whatsoever. In addition, in this very Conference trade, cargo is now moving in unprecedented volume, and rates are back to normal levels (after the initial effects of the Conference rate war), without the use of the exclusive-patronage system.

B. There is no public interest in favor of the exclusive-patronage system.

As previously stated, the existence of the exclusive-patronage system will not increase the movement of cargo, nor will the lack of such system stifle or prevent any cargo movements. The Petitions refer to the "general support" given to the system by the shipping public (Bd. Pet., p. 8; Conf. Pet., p. 9). These remarks have little foundation in fact. Neither the Board nor the Conference has established any right to speak for the shipping public in this respect. Both have been traditionally interested in espousing the interests of the steamship conferences. The shipper witnesses, appearing at the administrative proceeding gave no unqualified endorsement of the exclusive-patronage system (R. 33, 34). At least one shipper witness—*appearing on behalf of the Conference*—expressed his dissatisfaction with the differential between contract and non-contract rates (R. 33). Furthermore, neither the Board nor the Conference mentions that the only shipper witnesses to appear at the hearing were those of the Confer-

ence, imported from Japan by the Conference to testify at the proceeding.[16]

It would hardly appear consonant with the interests of the shipping public to promote a complete monopoly for the fixing of steamship rates. The Petition of the Board (Bd. Pet., pp. 10, 11), advances the curious argument that the effectuation of a conference monopoly, by use of the exclusive patronage system, is necessary to protect the higher-cost United States-flag operators. (Incidentally, Isbrandtsen is such a United States-flag operator.) In other words, the Board proceeds upon the assumption that Conferences fix rates to allow a profit to the highest-cost operator in the trade. It should be noted that the facts alleged in these arguments of the Board's Counsel were not presented at the administrative hearing, and the alleged facts involved are not so free from contention as to be within the realm of official or judicial notice. More importantly, however, the arguments are logically as well as legally absurd on their face.

The Federal Maritime Board is empowered and indeed directed to grant construction and operating-differential subsidies to United States-flag carriers under Titles V and VI of the Merchant Marine Act, 1936, as amended, 46 U. S. C. secs. 1151, *et seq.* The purpose of these subsidies is to place the United States-flag carrier on a parity with respect to operating and construction costs with his foreign-flag competitors. No similar policy of subsidy is announced in the Shipping Act of 1916, which is primarily a

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[16] The lack of shipper testimony in opposition to the powerful Conference Monopoly is not surprising. In the most recent book on the subject, *International Shipping Cartels*, (1953) by Daniel Marx, Jr., a professor at Dartmouth College, reference is made (p. 54) that the Alexander Committee (Vol. 4, pp. 5, 59) noted that very few shippers were willing to testify, fearing retaliation, and that the Report of the English "Royal Commission on Shipping Rings", found likewise, that shippers, in fear of reprisals, were afraid to testify.

regulatory act similar to the Interstate Commerce Act, 49 U. S. C. sec. 1, *et seq.* If the subsidy program places the United States-flag carrier in a position of parity with respect to foreign costs, why should the shipping public be required to pay a further subsidy, by way of rates fixed by foreign-dominated conferences to allow a profit to the high-cost American-flag carrier irrespective of subsidy? The suggestion is preposterous—the only real beneficiaries of such an astounding program would be the lower-cost, foreign-flag carriers, which thereby receive windfall profits and American shippers would be the involuntary donors.

The position of foreign-flag carriers in such monopolistic conference arrangements is obvious. Their interests of course are quite real, but they do not constitute the public interests of this country. There are 125 Freight Conferences on file with the Board, organized pursuant to agreements under Section 15 of the Shipping Act. As previously stated, 62 of these conferences employ the exclusive-patronage system, although only 10 have any non-conference competition whatsoever. These 125 Conferences are composed of 346 member lines, of which 305 are foreign lines and only 41 are American. In each conference trade, the foreign lines dominate, by reason of their numbers and consequent voting privileges, in some instances by as much as 22 to 1.[17] (These figures obtained from public records of Board).

There are over 75 American liner companies engaged in the foreign commerce of the United States. Only 41 of these lines belong to any Conference, and only 24 are members of Conferences which employ the exclusive-patronage system. The Board's arguments concerning "the public importance" of its position are certainly misconceived in view of these facts.

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[17] "Importance of the outcome to the parties is not enough", stated Mr. Justice Frankfurter in his dissenting opinion (p. 17), rendered February 25, 1957, in Nos. 28, 42, 46, and 50, *Rogers* v. *Missouri Pacific R. Co.*, and three other cases.

C. Petitioners could not prevail on the merits.

The Petitioners' arguments on the merits raise two primary contentions: (1) they argue that the decision below overturns administrative and judicial decisions (Bd. Pet. p. 14, Conf. Pet., pp. 12, 14); and (2) they further contend that the decision below is contrary to the construction of Section 14, Third of the Shipping Act as evidenced by the *legislative history*. These arguments are 99 per cent fallacious—the only part which is correct is that the Court below has overturned the Board's administrative decisions approving exclusive-patronage systems.

In the ensuing sections of this brief, Isbrandtsen will show that the Court of Appeals was not only correct in holding the exclusive-patronage system illegal under section 14 of the Shipping Act, but could also have held the system unduly prejudicial and unjustly discriminatory in violation of sections 15, 16, and 17 of the Act. Furthermore, it will be shown that the system could never be legally approved because it involves an agreement with shippers who are not "persons" subject to the Shipping Act, and who cannot consequently receive any immunity from the Anti-Trust laws, and that the Board's interpretation would render the Act unconstitutional.

Briefly, at this point it may be pointed out that the long-standing administrative interpretation referred to in the Petitions (Bd. Pet., p. 14; Conf. Pet., p. 12) has not been as consistent as Petitioners would imply. Prior to 1927, the Board's predecessor, the United States Shipping Board held the system illegal. *Eden Mining Co.* v. *Bluefields Fruit & S.S. Co.*, 1 U.S.S. B. 41 (1922). The Statutory District Court in *Isbrandtsen Company* v. *United States*, 96 F. Supp. 883 (S.D.N.Y. 1951), remarked that

> "the Board's decisions (none of which approving a dual-rate provision has heretofore come to court) *have lacked uniformity and consistency; and in such circumstances, administrative interpretations have little weight.*"

The Petitioners' claim that the decision below overturns judicial decisions is astounding. This Court will undoubtedly be surprised at Petitioners' contentions that it has previously held the exclusive-patronage system lawful, by implication, through its action of remanding cases to the Board on the ground of primary jurisdiction (Bd. Pet., p. 18). The Board itself on various occasions has been more frank concerning the status of these judicial decisions. For example, Chairman Clarence Morse of the Board, in hearings on February 7, 1957 (six days after the filing of the Petitions), before the Committee on Merchant Marine and Fisheries of the House of Representatives, engaged in the following colloquy with Representative Allen of California:

> MR. MORSE: ". . . Now, for the information of some of the members of the committee, a dual rate system is nothing more or less than an exclusive patronage contract under which a given shipper contracts with the conference that he will ship all of his shipments moving in foreign trade on vessels of the member lines of the conference. For many years the Board has consistently ruled that the dual rate system is lawful under the 1916 Act. The question has been raised in several court cases and in *none of them with a definitive answer*, in my personal opinion, but as a result of this ruling of the Board in the Japan-Atlantic conference, the matter went to the Federal Court of Appeals here in Washington and it was ruled that the system was unlawful per se.[18] Applications for certiorari to the Supreme Court were filed just last Friday, I believe, and if the Supreme Court grants the writ of certiorari, which I hope it will do, the matter will be finally determined by the Supreme Court as to whether the system is or is not lawful.[19]

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[18] The decision referred to is the decision of the Court below herein.

[19] Contained in the above testimony is the intimation that the Board will not consider the Court of Appeals' decision without affirmance by this Court as binding—a fear which Isbrandtsen has

MR. ALLEN: "In other words, then, the courts have ruled that the opinion held by Maritime over the years was not in accordance with law?
MR. MORSE: "*Some* courts have so held. There has been intimation by an earlier Supreme Court that the system was not unlawful per se. It was purely dictum by the Supreme Court in that early case."[20]

There is no mystery about what the Courts have done in previous cases involving the exclusive-patronage system. Until the present decision of the Court below, holding the system illegal, that question had never been decided by any court. How then could the decision of the Court below have overturned anything except the Board's own administrative decisions?

Petitioners' contentions concerning the interpretation of the Act are erroneous on their face. The Act is quite clear without resort to legislative history. But if such legislative history is to be examined, this history makes it absolutely plain that the system is illegal. Congress intended to outlaw every exclusive-patronage device of this sort, and the only reason it did not condemn this very system in *haec verba* was that *it was not then in use.*

In his opinion in the Court of Appeals Judge Washington stated

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expressed above. This intimation by the Board's Chairman becomes more explicit in the following colloquy:

Mr. Allen: "I would take it then that the present situation is that Maritime holds the same opinion as to the legality the ruling of the Court to the contrary notwithstanding.
Mr. Morse: "We have not been satisfied that the decision of the Court of Appeals is the last word . . ."

[20] The case referred to is undoubtedly *Swayne & Hoyt* v. *United States*, 300 U.S. 297 (1937), which we shall discuss infra pp. 55-59. This language of this case which the Board's Chairman refers to as "purely dictum" is referred to in the Board's Petition as a "holding" of this Court (Bd. Pet., pp. 14, 18). Similarly, the Conference also urges that the "footnote" involved in the *Swayne & Hoyt Case* was "not dictum" (Conf. Pet., p. 19).

". . . the fact is that the contracts examined by the Alexander Committee in 1913 were materially different from the contracts before us now." (R. 251)

"Second, and more significant, is the fact that the contracts considered in *Swayne & Hoyt* closely follow the outlines of the contracts reviewed by the Alexander Committee in 1913, which are materially different from the contracts in this case, see text *infra*." (R. 250, footnote 2).

II

THE COURT OF APPEALS CORRECTLY HELD THAT THE EXCLUSIVE PATRONAGE SYSTEM CONTRAVENES SECTION 14, THIRD OF THE SHIPPING ACT.

It is quite significant that the Petitions devote only a few pages to attacking the real basis of the decision of the Court of Appeals, *viz.*, the Court's holding that the system violates section 14, Third of the Shipping Act (Bd. Pet., pp. 24-26; Conf. Pet., pp. 21-23). It seems unnecessary in this brief to analyze these arguments of Petitioners at length, for precisely the same arguments were made to the Court of Appeals, and no prolonged discussion need be added to the cogent and decisive reasoning of the Court below rejecting each of them.

Section 14, Third of the Shipping Act is undisputably clear on its face. It provides as follows:

> "No common carrier by water shall, directly or indirectly, . . .
>
> "*Retaliate against any shipper* by refusing or threatening to refuse, space accommodations when such are available, *or resort to other discriminatory or unfair methods, because such shipper has patronized any other carrier* or has filed a complaint charging unfair treatment, or for any other reason."

The Board and the Conference have always had trouble in facing up to the plain words of the statute, and, on a variety of misconceived arguments, they have squirmed to avoid these unequivocal proscriptions. The Board in its

present petition would seek to overcome the clear words of the statute by regarding most of its language as surplusage and by then distorting what remains (Bd. Pet., p. 25).[21] In this respect, the Board argues that the only retaliation which is prohibited is "(a) the forfeiture of accrued rebates, and (b) the blacklisting of shippers by a denial of space for future shipments even at the full rate" (Bd. Pet., p. 25). It is sufficient to say that if Congress had intended to prohibit only these malpractices, already condemned in section, First, it certainly would not have inserted the additional clear proscriptions contained in section 14, Third. Both the Board and the Conference leave unexplained the words, "or resort to other discriminating or unfair methods," and they choose to ignore the language, "because such shipper has patronized any other carrier."

The incredible arguments contained in the Board's Petition are joined in, at least in part, by the Conference (Conf. Pet., p 21). The Board and the Conference Petitions are, however, in disagreement with the Board's Report, which they are apparently defending, for the Board was originally willing to overlook all words in the statute except "retaliation," and for the "proper" definition of that word—out of context—it resorted to the lexicographer. In this respect, the Board had stated in its Report that:

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[21] Curiously enough the Board argues contrary to its "surplusage" argument in construing the words of section 14, Third, when it states that section 14, Third could not outlaw the deferred rebate system because this system is already prohibited in section 14, First (Bd. Pet., p. 20). Incongruously, however, the Board admits subsequently that section 14, Third does prohibit two features of that system, *viz.*, (a) the forfeiture of accrued rebates, and (b) the denial of space accommodations (Bd. Pet., p. 25). It is inconceivable to the Board that the language of the statute means precisely what it says and that Congress intended to prohibit any similarly conceived exclusive-patronage device that retaliated or resorted to other discriminatory and unfair methods against a shipper, because the shipper would not give his exclusive patronage to the carrier.

". . . To retaliate is defined in Webster's New International Dictionary, 1945 Unabridged Edition, as 'to return like for like' or 'evil for evil.' Retaliation perhaps connotes the idea of vengeance. . . . We cannot view the adoption of the dual rate system or the charging of a higher rate to a shipper who voluntarily declines to give his exclusive patronage as a 'retaliation.' The higher rate cannot be said to be charged as a retaliation for 'patronizing any other carrier.' It is charged because the shipper does not sign the contract, regardless of whether or not he patronizes any other carrier. A non-signing shipper who does not patronize a non-conference carrier is treated as harshly as a non-signing shipper who ships partially or exclusively with such a carrier." p. 58).

The answer of the Court of Appeals to this nonsense was far too mild. Judge Washington, in his concurring opinion, in which Judges Prettyman and Fahy concurred, stated:

"The crucial question on this appeal is of course whether Section 14, Third, of the Shipping Act of 1916 proscribes the type of contract here involved.

"In the first place, it seems clear that in actual practice the contract system is being used to penalize a shipper because he has patronized another carrier, or at least reserved the right to do so. Is this 'retaliation,' proscribed by the Act? Certainly there seems no reason to limit 'retaliation' to the dictionary definitions of 'returning like for like' or 'evil for evil,' which have been selected by the Board. The very example used by the statute, boycotting for use of another carrier, is not 'like for like,' nor are the boycotting carrier or group of carriers necessarily imbued with ideas of doing evil. But detriment to the independent shipper and the independent carrier plainly results.

"Are these contracts, then, the sort of 'discriminating or unfair methods' that the statute sought to anticipate? That the contract system comes within the literal meaning of this phrase is clear. As the Supreme Court observed in *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 303 (1937), a contract system

> under which different prices are charged for the same transportation of identical cargoes to identical ports under identical circumstances is "prima facie discriminatory.' Nevertheless, the Board urges that the literal meaning of the statute should not be followed." (R. 249, 250). [footnotes omitted].

It is difficult to imagine a clearer case of "discriminatory or unfair methods" against a shipper because such shipper has patronized another carrier than the exclusive-patronage system. Even if these words were to be overlooked, and the all emphasis were to be placed on the word, "retaliation," as used in the statute, the arguments of the Board and Conference are obviously groundless.

The Board is speaking with no relation to reality when it states that the Conference is retaliating against the shipper who will not give his exclusive patronage to the Conference only "because the shipper does not sign the contract" (R. 58). The Board refuses to look at the *real* purpose of the contract which is to prevent the patronizing of any non-conference carrier. Under the Board's interpretation, the prohibition against retaliation would be meaningless and without any force whatsoever, because the carrier would always be able to avoid this prohibition by the mere device of holding out any sort of exclusive patronage contract to the shipper which would prohibit him from patronizing other carriers, thereby enabling the carrier to contend that the unlawful retaliation was *only because the shipper did not sign the contract.*

Neither Board (R. 58) nor the Conference (Conf. Pet., pp. 21, 22) could scarcely be serious in suggesting that the Conference regards the mere signing of the exclusive-patronage contract as determinative. Of course, the Conference members are not interested in a mere paper transaction—they are concerned only in preventing shippers from patronizing their non-conference competitors, and thus, of course, obtaining all of the shippers' business.

The exclusive-patronage system "retaliates" or "resort[s] to other discriminatory or unfair methods" against shippers in at least two obvious respects: First, it discriminates against the shipper, who would choose to maintain his independence of choice to patronize a non-conference line, by exacting from him the higher non-contract rate; and secondly, it discriminates against the "contract shipper" (who has signed an exclusive-patronage contract) for his act of employing a non-conference carrier by imposing a severe penalty upon him. Both of these "retaliations" or "discriminatory or unfair methods" are imposed precisely because "such shipper has patronized [another] . . . carrier," which are the very words of the prohibition in section 14, Third.

Neither the Conference nor the Board have even undertaken to answer the second "retaliatory" or "discriminatory or unfair" feature of the system, *viz.*, the penalty imposed on the "contract shipper" for patronizing an independent carrier. This retaliation is most invidious when it is realized that the "contract shipper" is economically coerced into signing the exclusive-patronage contract—as the Board's Report admits (R. 35)—and when it is realized that the threat of this severe penalty would tie the "merchants to a group of lines" in perpetuity.[22]

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[22] This is one of the main reasons why Congress specifically condemned the deferred-rebate system which was then in use as the Board's Petition admits (Bd. Pet., p. 22). It is precisely why the present exclusive-patronage system would have been specifically condemned if it *had* been in use, and one reason why it is prohibited under section 14, Third. The Board has been willing to overlook this insidious feature of the exclusive-patronage system which keeps shippers practically forever within the conference fold just as effectively as the deferred-rebate system. Any "cancellation privilege" to the shipper (requiring three months' or more notice) is illusory if there is no independent carrier in the trade adequate to satisfy the shipper's needs on a year-round basis.

III

THE LEGISLATIVE HISTORY OF THE ACT OFFERS NO SUPPORT TO THE PETITIONERS

The legislative history of the Act is divided into two phases:

First, the United States House of Representatives on February 24, 1912 and June 18, 1912 adopted resolutions directing the Committee on Merchant Marine and Fisheries to conduct an investigation of steamship conferences. That Committee, under the Chairmanship of Hon. Joshua W. Alexander of Missouri, gathered data and testimony over a period of nearly two years. The records of the proceedings were published in four volumes and constitute the preliminary report of the Committee.[23]

Secondly, after the printing of the initial Alexander Committee Report in 1914, several bills were introduced and extensive hearings were held in both the House and the Senate.

The Petitions of the Board and the Conference rely entirely on a distortion of the initial Report of the Alexander Committee (Bd. Pet., p. 24; Conf. Pet., p. 19). Even this initial Report, however, lends no support to Petitioners. The Report itself is published in four volumes; more than three and one-half of the volumes are devoted to summarizing the evidence and testimony received, and the end of the fourth volume contains a digest of the *arguments* presented to the Committee, together with the Committee's recommendations for legislation. It is important to recognize the actual status of this preliminary Report of the Alexander Committee, because the portions relied upon by the Petitioners are actually nothing more than a summary of *arguments* which had been made to the Committee at the hearings. Most of the arguments, of course, were made by

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[23] *Investigation of Shipping Combinations*, H. R. Doc. 805, 63d Cong., 2d Sess. (1914).

the conferences themselves and their member lines. If such self-serving arguments made to a Congressional Committee could ever have a proper standing in the "legislative history" of an Act, it would certainly be held remote at best, and could hardly be considered determinative in interpreting the plain and unequivocal language of the statute.

The legislative history of the Act is precisely clear that Congress intended to preserve independent competition and to prevent discriminations by conference lines against shippers. Conference were allowed to exist, pursuant to section 15 of the Act, only as a matter of privilege, not of right, and their activities were intended to be subject to the closest scrutiny and to all statutory proscriptions in the Act. Congress clearly prohibited in principle the exclusive-patronage system, which has the primary purpose of eliminating and suppressing independent competition. In this respect, it specifically prohibited all such exclusive-tying arrangements or unfair monopolistic practices *then in use* by conferences—and the only reason that the present type of exclusive-patronage system was not specifically condemned was that *it was not then in use.* The present exclusive-patronage system is similar in all essential respects to the specifically outlawed exclusive-patronage-*deferred-rebate* system which was then in use.

In *Swayne & Hoyt* v. *United States*, 300 U.S. 297, 306, 307 (1937), this Court stated that,

> "As the Secretary has interpreted the evidence, the operation of the contract system [exclusive-patronage system], in the circumstances of this case, does not differ substantially from that of 'deferred rebates' outlawed in both foreign and coastwise shipping by Section 14 of the Shipping Act."

A. The initial report of the Alexander Committee offers no support to petitioners' position.

As stated above, the first three volumes of the initial Report of the Alexander Committee and more than one-half

of the fourth constitute merely a summary of the testimony of the witnesses (see 53 Cong. Rec. 8095). The latter part of the fourth volume contains a summary of the *arguments* which were presented to the Committee.[24] *This preliminary or initial Report of the Alexander Committee does not contain any proposed draft of legislation for a shipping bill.*

The Committee had made certain recommendations at the end of this preliminary Report, which have been traditionally ignored by the Board and the Conference.[25] The Committee expressed concern over various unfair methods then used by conference lines "to meet the competition of non-conference lines" (p. 417). There is contained in these specific recommendations not the slightest hint that the Committee approved any exclusive patronage arrangements with shippers, whether the rebate involved be deferred or *pre*ferred, as is the case of the present substitute for the deferred-rebate system. In this respect, the Committee, in fact, expressly condemned such practices, in the following explicit recommendation for legislation (p. 421):

> "That rebating of freight rates to shippers be made illegal; and that, with due regard to the proper loading of the vessel and the tonnage available, discrimination between shippers, or ports, in the matter of rates and space accommodations be prohibited. In this connection *it is the belief of the committee that water carriers should be required to charge equal rates to all* shippers irrespective of the volume of freight offered for shipment."

In the face of its specific recommendation that "rebating of freight rates to shippers be made illegal," how could

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[24] Volume 4 contains 424 pages, and the Summary begins at page 281 and continues through page 415.

[25] These specific recommendations comprise nine pages out of several thousand. They are the *only* recommendations of the *Committee* in its Report.

the Committee have given any "implied approval" to the exclusive-patronage system now before this Court, as the Board Petition suggests (Bd. Pet., p 21)? The suggestion is preposterous on two counts: first, the system was not *then* in use, as we shall prove below, and as the Court of Appeals has already found; and, secondly, the language relied on by the Board for such "implied approval" was merely an *argument* made *to* the Committee.

The Court of Appeals below has specifically rejected this "implied approval" argument of the Board and the Conference. Judge Washington, in dismissing this argument stated:

> "Were the premise sound, the argument would have some merit. But the fact is that contracts examined by the Alexander Committee were materially different from the contracts before us now." (R. 251).

Shortly before the Alexander Committee's investigation, the conferences had become concerned over the illegality of the deferred rebate system, and such rebates were abandoned in some trades, especially in the export trades of the United States (p. 288). Apparently, as the deferred rebate system was abandoned, the system was replaced by simple contracts of carriage, specimens of which are contained in Volume One of the Committee's Report (pp. 97, 248, 249, 251, 258). These contracts were not at all like the deferred-rebate system, or its modern counterpart, the preferred rebate system. The limited contracts of carriage before the Alexander Committee were fully described in the opinion of Judge Washington, and by the Court below as follows:

> "The 1913 contracts were bona fide *requirements* contracts. The sellers (carriers) undertook a firm obligation to provide space; both parties undertook firm obligations as to the price. And since the price was fixed for the term of the contract (usually 6 months), the price figure in the contract represented a hedge on the part of both parties against fluctuations

> in rates. *In the contracts in suit the carriers' commitments as to space is almost illusory,* being a commitment to carry "so far as regular services are available." The price aspect of the contract is in terms subject to increases. Thus, the two principal considerations normally given to a buyer (the shipper) under a requirements contract—guarantee of supply and guarantee of no rate increase—are lacking. In their stead are two essentially penal provisions—the higher rate the liquidated damage clause—*both imposed to coerce shippers to refrain from using non-Conference carriers. These differences are dispositive of the Board's principal argument.* Implied Congressional approval of a bona fide requirements contract is no basis for exempting the contracts in this case from the plain meaning of "discriminating or unfair methods." They must therefore be condemned." (R. 251, 252).

It was apparently argued to the Committee that these "requirements" contracts were not as objectionable as the deferred-rebate system. Herein lies the key to the Board's distortion of the Committee Report and to the repetition of the argument in a footnote by this Court in the *Swayne & Hoyt* case. Under the heading "Advantages of Shipping Conferences and Agreements in the American Foreign Trade" (p. 295), the Alexander Committee Report summarized various *arguments* made *to* it. The summary was not represented as the *Committee's* views, and, in fact, it is specifically stated in a footnote that:

> "This summary represents the views of leading exporting and importing firms operating at our most important ports." (p. 295)

It is emphasized throughout that these were the *arguments "presented to the Committee"* (Ibid.).

In a similar fashion, the Committee summarized the "*Dis*advantages of Shipping Conferences and Agreements, as Now Conducted" (p. 304). One of the objections listed concerned the deferred-rebate system, which was argued to be objectionable because it tied "the merchant to a group

of lines for successive periods" (p. 307). The Committee went on in its summary of this *argument* to state that:

> "In this connection, it is argued that the ordinary contract system does not place the shipper in the position of continual dependence that results from the deferred rebate system." (p. 307).

Over the years, proponents of the System have often deleted the words "it is argued". In its Petition herein the Board does not omit those words but instead submits a most extraordinary interpretation of the language quoted above, stating, in italics "It is most significant that the Committee here took pains to distinguish this condemned system from the ordinary contract system." (Bd. Pet., p. 22). Of course, the Committee did no such thing!

There can be no doubt that this language from the Alexander Report was not a recommendation of the Committee, but merely a summary of an *argument* made *to* it. Even if the Committee had been referring to the exclusive-patronage-*preferred* rebate system (*which it was not*, because that system was not then in use), the language could not possibly constitute an "endorsement" of such system.

B. Congress intended to preserve independent competition and to prevent discrimination.

A comparison of the preliminary Report of the Alexander Committee,[26] with the statutory proscriptions in section 14 of the Act, compels the conclusion that the Committee and the Congress intended to prohibit every type of concerted conference activity that might be the vehicle for eliminating or preventing independent competition. In its discussion of the subject "Meeting the Competition of Lines Outside the Conference," the Committee set forth various methods

[26] Page references given above to the Alexander Committee Report are to *Investigation of Shipping Combinations*, House Committee on Merchant Marine and Fisheries, H. R. Doc. 805, 63d Cong., 2d Sess., pp. 287 et seq.

they used by conferences to accomplish this pernicious purpose:

(a) The deferred rebate system (p. 287);

(b) Collective competition against a single carrier through the use of fighting ships (p. 289);

(c) The use of contracts, either jointly or individually by conference members, which provided preferential rates in exchange for the shipper's agreement not to patronize another carrier (p. 290); and

(d) The use of contracts providing preferential rates based on the volume of shipments (p. 291).

These specific conference practices outlawed as crimes in section 14 of the Act, are patterned precisely, both in substance and sequence, after the Committee's enumeration of devices used to eliminate competition:

(a) deferred rebates are barred by sub-section 1 of section 14;

(b) the use of the fighting ship is prohibited by sub-section 2 of section 14;

(c) discrimination or retaliation against a shipper for patronizing a non-conference carrier is prohibited by sub-section 3 of section 14; and

(d) unjust discrimination based upon volume of shipments is forbidden in subsection 4 of section 14.

In view of this precise correlation between the Report and the Act, it is clear that Congress adopted a regulatory scheme intended to prohibit each and every device, which had for its purpose the elimination or suppression of non-conference competition, including the presently proposed exclusive-patronage-contract system.[27]

[27] It is interesting to note that the Alexander Committee recommended the prohibition of deferred rebates despite the fact that

In section 14(3), Congress sought to reach every discriminatory device, contract or otherwise, designed to retaliate against a shipper for patronizing any other carrier or for any other reason. In fact, if the reference in the section to retaliation by "resort to other discriminatory or unfair methods" is not to be disregarded as surplusage, it must necessarily be read as covering practices not prohibited by name. No other view is consistent with the remarkable correlation between the four types of devices considered by the Committee under the caption "Meeting the Competition of Lines Outside the Conference" and the four types of device banned by Congress in section 14.

Of course, Congress did not stop with section 14 in its effort to prohibit unfair and discriminatory practices which were employed by conferences and common carriers. Section 14 in this respect prohibits unfair and discriminatory practices employed for retaliatory purposes. But even if the present system were not retaliatory—as the Court of Appeals has held it clearly is—it is fatally defective and necessarily illegal when measured against the further statutory proscriptions against unjust discrimination, undue prejudice, preferences, and unfair practices or methods set forth in section 15, 16 and 17 of the Act.

C. The present type of exclusive patronage system was never before the Alexander Committee.

The only essential difference between the deferred-rebate system described by the Alexander Committee (p. 287) and the present *pre*ferred-rebate system is merely the difference between a deferred and a *pre*ferred rebate. Obviously, neither the Committee nor Congress would have been so naive as to condemn the former and approve the latter, at least without considerable discussion.

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it found (p. 288), "the deferred rebate systems now in use are equally open to all shippers who agree to give exclusive patronage, and are granted without discrimination as regards the size of individual or total shipments," an argument now advanced in support of the present *pre*ferred-rebate system.

Until the recent unfounded assertions by the Board that the Alexander Committee gave its "implied approval" to the exclusive-patronage system (Bd. Pet., p. 21), it has generally been recognized that the system was not employed in American commerce until several years after the passage of the 1916 Act. A memorandum before the Board, dated June 16, 1926, in a proceeding known as *Ex Parte 5, Contract Rate Investigation* (subsequently dismissed on March 3, 1927, and strangely not reported) states that the exclusive-patronage-contract system *was first used* in 1922 in the North Atlantic United Kingdom Freight Conference Trade in connection only with the carriage of automobile tires. The author of this memorandum was the Chief of the Board's Bureau of Regulation and it is in the "official records" of the Board.[28] The Board's Regulation Chief, the officer normally charged with the duty to advise the Board on such matters, was obviously in a far better position *in 1926* to determine when the system was first used than the Board's present Counsel are today.

D. Subsequent legislative history after the initial report of the Alexander Committee makes it clear that the exclusive patronage system is illegal.

After the printing of the initial Alexander Committee Report in 1914, Congress was not inactive with respect to shipping legislation. H. R. 10500 (the original shipping bill) was introduced on January 29, 1915, and hearings were held from February 10 to March 9, 1915 (53 Cong. Rec. 8074). Additional hearings were held between April 13 and 22, 1915. Various other shipping bills were introduced and considered: H. R. 18518, 63rd Cong; H. R. 3728, 63rd Cong.; H. R. 450, 64th Cong.; H. R. 10500, 64th Cong.;

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[28] Isbrandtsen's counsel obtained access to the above memorandum by inspecting the minutes of the Shipping Board of March 3, 1927, which are public and may be inspected by interested parties pursuant to Rule 1(e) of the Board's Rules of Practice and Procedure.

H. R. 14337, 64th Cong.; H. R. 15455, 64th Cong.; H. R. 15565, 64th Cong.

Hearings were also held on H. R. 14337 before the House Committee between April 13 and 22, 1916. H. R. 15455 was the bill that eventually passed and it was extensively debated in the House and in the Senate, where it was substantially amended. In this entire legislative history of the actual drafting of the Act there is *not one single mention* of any exclusive-patronage-contract system other than the deferred-rebate system.

Representative Saunders of Virginia, in explaining the regulatory proscriptions of what is now section 14 of the Act, on the floor of the House, had no difficulty in expressing its clear meaning, which would condemn the present system (53 Cong. Rec. 8105):

> "What is the rest of that section? Not only are deferred rebates eliminated, not only are 'fighting ships' prohibited, but a carrier is forbidden to retaliate against any shipper who refuses to use that particular line in the shipment of his freight. *Do you think that a carrier ought to be allowed to put a black mark against you, or retaliate against you, when you make your choice of another line, or ship to carry your freight?*"

Senators Cummins on the floor of the Senate expressed great concern that ordinary rebates "just as obnoxious to common sense and good reason" as deferred rebates might be permitted (53 Cong. Rec. 12449). Senator Fletcher explained that such a result would not occur and quoted the remarks of Dr. Johnson, a drafter of the bill, before the House Committee on H. R. 14337.

In other words, there was a frank recognition that Congress itself could not, in specific terms, conceivably outlaw in advance all possible methods of destroying outside competition which might be devised. It trusted to the alertness of the Board and the Courts to condemn subsequent "un-

fair" practices which might be invented for evading the statute.

IV

THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH ANY PRIOR DECISION OF THIS COURT OR OF ANY OTHER COURT.

The contention of Petitioners that the decision of the Court below is "inconsistent with" (Conf. Pet., p. 14) and "overturns" (Bd. Pet., p. 14) prior judicial decisions, including decisions of this Court, is most extraordinary. It has generally been conceded, as it was by the Board's own Chairman in his testimony before the House Merchant Marine and Fisheries Committee, on February 7, 1957 (six days after the present Petitions were filed with this Court),[29] and it is obvious from the cases, that until the decision of the Court below, there has been no definitive judicial decision on the legality or illegality of the exclusive-patronage system.

It is incredible, under the circumstances, that Petitioners could contend that the decision of the Court below is "inconsistent with" or "overturns" any prior judicial decisions.

All of the decisions presently relied upon by the Board and the Conference have been analyzed in the opinion of the Court of Appeals. After analyzing the cases, Judge Fahy stated:

> "From this situation in the Courts the Board contends that the dual rate system has not been considered invalid *per se*, otherwise the Courts would have disposed of these cases on that ground. This position is an arguable one; but the fact is that the cases do not decide the point." (R. 261).

Except for the *Swayne & Hoyt* Case, which will be discussed below, this Court is well aware that its previous

[29] See *supra*, pp. 35-36.

actions with respect to the exclusive-patronage system have either involved a denial of *certiorari*, *Isbrandtsen Company v. United States*, 211 F. 2d 51, cert. denied sub nom., *Japan-Atlantic & Gulf Freight Conference* v. *United States*, 347 U.S. 990 (1954), or a refusal to consider the question of legality on the ground that the Board had primary jurisdiction to consider the facts, *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U.S. 474 (1931); *Far East Conference* v. *United States*, 342 U.S. 570 (1951), or a refusal to consider the question of legality on the ground that the Board had not made proper findings of fact to support even its own reasoning, *A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Company*, 342 U.S. 950 (1952).

Neither the arguments of the Board nor the arguments of the Conference concerning the alleged legality of the exclusive-patronage system have ever prevailed in any case before this or any other Court. The Courts have refused to decide the issues of illegality heretofore raised primarily because of the Board's own procedural deficiencies and because of the Board's failure to exercise its primary jurisdiction. The Board's only success in these cases has been merely to have the cases remanded to it, a result it has consistently striven to accomplish.

(1) In *Isbrandtsen Company* v. *United States*, 81 F. Supp. 544 (S.D. N.Y., 1948), an injunction was granted to Isbrandtsen restraining a Board order purporting to allow the Eastbound and Westbound North Atlantic Conferences to institute the system. The injunction was conditioned upon Isbrandtsen's prosecution before the Board of a complaint. An appeal by the Conference and the Board to this Court was dismissed sub nom. *A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Company*, 336 U.S. 941 (1949).

(2) After the above decisions in the *North Atlantic* Case, Isbrandtsen prosecuted its complaint before the Board and appealed the Board's decision to the Statutory District

Court. In *Isbrandtsen Company* v. *United States*, 96 F. Supp. 883 (S.D. N.Y., 1951), affirmed by an equally divided Court, sub nom. *A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Company*, 342 U.S. 950 (1952), it was held on further appeal of the North Atlantic case, after Board proceedings, that the Board order dismissing the complaint of Isbrandtsen in that case was invalid because the differential between contract and non-contract rates was obviously arbitrary and therefore unjustly discriminatory. The Court specifically declined to decide the issue of legality in this case because of the obvious failure of the Board to make the necessary basic, pivotal, or constitutive findings to support even its own reasoning.

(3) In *Far East Conference* v. *United States*, 342 U.S. 570 (1951), this Court reversed a decision of the New Jersey District Court which refused to dismiss a complaint filed by the Department of Justice against the use of the system, based upon an alleged violation of the Anti-Trust Laws, the sole ground of this Court's reversal being that the Board had primary jurisdiction.

(4) In *Isbrandtsen* v. *United States*, 211 F. 2d 51 (D.C. Cir. 154), the Court of Appeals held, on the previous proceeding in this case, that the exclusive-patronage system constituted an agreement under section 15 and had to be approved, after hearing under section 15 of the Act, before any action could be taken under it by the Conference. The Board had claimed that such approval was not necessary and that the system should be allowed to go into effect without an opportunity for any hearing. Petitions for certiorari to this Court by the Board and by the Conference were denied, *F.M.B. et al.* v. *Isbrandtsen Company*, 345 U.S. 975 (1952).

In each of these cases to which the Board was a party, its *contentions were rejected* and *its orders were reversed*, although the Board repeatedly avoided a decision on the basic question of illegality. It is certainly audacious—to

say the least—that the Board's Counsel should now offer these decisions as support for their contention that the Courts have held the system not "illegal *per se*" (Bd. Pet., p. 18).

Similarly, there is no support in any of the other cases cited by the Board or by the Conference for the proposition that the system is not illegal *per se*.

Both the Board and the Conference cite *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U.S. 474 (1931), (commonly called the "Cunard Case") to establish their contention that the decision of the Court below is in conflict with that decision of this Court (Bd. Pet., p. 14; Conf. Pet., p. 14). Just how this case could possibly establish that proposition is difficult to perceive. The Cunard case was a suit by a private steamship company, under the Sherman Anti-Trust Act, 15 U.S.C. §§ 1-7, and the Clayton Act, 15 U.S.C. §§ 12-27, against a group of steamship lines using the exclusive-patronage system. It was held by this Court that a *private party* could not entertain the suit for injunctive relief under section 16 of the Clayton Act, 15 U.S.C. § 26, because the Shipping Board had *primary* jurisdiction over the factual subject matter of the complaint under the Shipping Act. Nowhere in the opinion of either this Court or the Court of Appeals therein is there the slightest indication of a holding that the system was "not illegal *per se*", for that issue was not decided.

The complete absurdity of the Board and Conference position is most fully apparent, however, in their strained analysis of the case of *Swayne & Hoyt* v. *United States*, 300 U.S. 297 (1936). The Board and the Conference virtually rest their case upon the language appearing in a footnote to this decision, which language was merely a repetition of an undisputed argument made by the parties in that case to this Court and was irrelevant to any issue raised in the proceeding (Bd. Pet., p. 14; Conf. Pet., p. 17). On the basis of the reasoning of the Board and of the Con-

ference, in fact, it is the first time in American jurisprudence that a footnote attached to a judicial opinion, *relating to an issue not raised in the case*, is offered as the major part of the Court's decision.

The *Swayne & Hoyt* case was an appeal by a Conference of a decision, by the Shipping Board Bureau (the then administrator of the Shipping Act) in *Gulf Intercoastal Contract Rates*, 1 U.S.S.B.B. 524 (1936), holding that the exclusive-patronage system was not justified and was unduly prejudicial in violation of section 16 of the Act [when used in the intercoastal trade]. The question of the illegality of the system as such *was not pressed* by either party to the appeal. The Conference, the appellant, argued that the system must be approved and the Secretary of Commerce, representing the Shipping Board Bureau, sought merely to justify his decision on *the facts* in that case. There was, therefore, no "case or controversy" before this Court concerning the basic illegality of the system under any section of the Shipping Act, much less under any other statute or under the Constitution. *The Court was necessarily limited to the issues before it, which concerned the sufficiency of the evidence, and any further expression would have constituted an advisory opinion.*

In the review of the agency decision in the *Swayne & Hoyt* case, both the Statutory District Court [18 F. Supp. 25 (1936)] and this Court [300 U.S. 297 (1937)] held that the Secretary of Commerce was justified in holding that the system was unjustly discriminatory. The fact that there was no actual case or controversy before the Court on the fundamental illegality of the system *per se*, and, therefore no arguments presented to the Court alleging such illegality, accounts for the footnote on page 307 of this Court's opinion, which has been quoted, as creed, in every Conference and Board brief.[30] As explained above, the footnote

[30] The Court of Appeals below has commented upon this much heralded footnote, in the *Swayne & Hoyt* case, as follows:

contains certain incorrect conclusions conjured from the Alexander Committee Report to the effect that "the Committee did not condemn the contract system completely." The footnote goes on to say, however, that:

> "The policy of the statute may be properly applied where, as in the circumstances of this case, the contract system must be taken as actually operating to effect a monopoly. Cf. *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, 1 U.S.S.B. 41."

If this footnote were "a part of the decision, and not dictum," as Conference Counsel astoundingly asserts (Conf. Pet., p. 19), it would be ample reason for the basic *illegality* of the present system. The Board has frankly admitted that the unmitigated purpose of the system is to secure a complete monopoly (See Appendix C hereto). In the instant case, there can be no dispute that a monopoly would result. Therefore, "the policy of the statute may properly be applied where, as in the circumstances of this case, the contract system must be taken as actually operating to effect a monopoly."

The *Swayne & Hoyt* case presented a most unusual spectacle, for there was *no* party to the case raising the question

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"It is urged that footnote 3 of the Court's opinion in *Swayne & Hoyt* is some authority for exempting the contracts in this case from Section 14, Third. There are two answers to this argument. First, the Court was there concerned not with a recommendation of the Alexander Committee but with an argument that had been addressed to the Committee. See H. R. Doc. No. 805, 63rd Cong., 2d Sess. 307 (1914). Second, and more significant, is the fact that the contracts considered in *Swayne & Hoyt* closely follow the outlines of the contracts reviewed by the Alexander Committee in 1913, which are materially different from the contracts in this case, see text *infra*. The contracts in *Swayne & Hoyt* contained a firm price agreement that could not be varied during the term of the contract. See *Swayne & Hoyt* v. *United States*, 18 F. Supp. 25, 26 (D. D. C. 1936). (R. 264).

of the fundamental illegality of the system. The Board and the Conference admit that the Secretary of Commerce did not assert such a position. The Board's present Report points out that the agency decision, from which appeal was taken in the *Swayne & Hoyt* case, had stated that (R. 44):

> "Whether any such dual rate system (in foreign commerce) is lawful is a question which must be determined by the facts in each case."

This is obviously the argument that was presented to the Court by the Secretary of Commerce, as Respondent. It is not surprising, therefore, that the Court, under such circumstances, did not hold the system illegal *per se*, for it would have been deciding a question on its own initiative that was neither raised, argued, nor briefed. The Court, confronted with this unusual situation, did no more than repeat the analysis made by the Shipping Board Bureau. Even if the Court had reversed the Shipping Board Bureau, it would not have constituted a holding in favor of the *legality* of the system, because the legality of the system just was not an issue in that case, either before the Court or the administrative agency.

Furthermore the only section of the Shipping Act *in any way involved* in the *Swayne & Hoyt* case was *Section 16*—not Section 14(3) or any other section. The proscription of Section 16 is analogous to that of Section 3 of the Interstate Commerce Act. But the basic illegality of the system was not in issue *under even that section*—only the agency's factual determinations were in issue. The far more serious questions of illegality under Section 14, 15 and 17 of the Shipping Act, and under the Anti-Trust Laws (because the system involves parties not subject to the Shipping Act), and the Constitutional issue were in no way raised in the *Swayne & Hoyt* case and *had never been decided by any court*, prior to the instant decision of the Court of Appeals below, herein.

This analysis of the cases is fully confirmed by the Court of Appeals below. Judge Fahy, in this respect, stated the opinion of the Court as follows:

> "We are aware that the dual-rate system has not been held by any judicial decision to be invalid under section 14, Third; that is, without regard to the reasonableness or justness of the discrimination inherent in the system. We have already referred to *Swayne & Hoyt, Ltd.* v. *United States, supra*, which, though it upheld the Board in condemning the dual-rate system there involved, did not rest upon section 14, Third. In *Far East Conference* v. *United States*, 342 U.S. 570, the court, adhering to principles previously laid down in *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474, required the District Court to dismiss a suit of the United States which attacked the dual-rate system as violative of the Sherman Act, without the particular system having been passed upon initially by the Board. And in *A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Co.*, 342 U.S. 950, the court by an equally divided vote affirmed *Isbrandtsen* v. *United States*, 96 F. Supp. 883, which had invalidated the dual-rate system there involved, not under Section 14, Third, but because the spread between the two rates was found to be arbitrary . . ." (R. 260, 261).

In view of this situation before the Courts, it will undoubtedly be a great surprise to this Court that the Board would dare to assert that there has been even an implicit or tacit ruling on the legality of the system by any Court.

V

THE EXCLUSIVE-PATRONAGE SYSTEM IS FUNDAMENTALLY UNLAWFUL FOR VARIOUS REASONS OTHER THAN THE VIOLATION OF SECTION 14, THIRD.

In addition to the basic and unavoidable illegality of the exclusive-patronage system under Section 14, Third of the Shipping Act, as the Court of Appeals has held, the system is fundamentally unlawful for various other reasons. These other issues were not met in the decision of the

Court below, and it was unnecessary for the Court to meet them, in view of its holding that the system is unlawful under Section 14, Third. *The additional obstacles which the exclusive-patronage system would have to overcome in order to be rendered legal are of substantial importance, and constitute further cogent reasons why Petitioners have no chance of succeeding before this Court on the merits, and why THE JUDGMENT OF THE COURT BELOW SHOULD BE AFFIRMED.*

The exclusive-patronage system is also fundamentally unlawful for at least the following reasons:

First, it is unjustly discriminatory and unduly prejudicial in contravention of sections 15, 16 and 17 of the Shipping Act.

Secondly, the Board could never have any discretion or authority to approve the exclusive-patronage system because it involves as its main and most essential ingredient an exclusive-patronage contract to be entered into between common carriers and shippers, the latter parties not being "persons" subject to the Shipping Act nor consequently capable of receiving any immunity, under section 15 of the Shipping Act, from the Anti-Trust Laws.

Thirdly, the Board's interpretation of the Shipping Act would render section 15 of the Act unconstitutional, and consequently invalid, as an improper delegation of legislative powers and because it would deprive Isbrandtsen and other carriers of property without due process of law.

A. The exclusive patronage system is unjustly discriminatory.

The system is also necessarily and fatally illegal because it is unduly prejudicial and unjustly discriminatory in violation of sections 15, 16, and 17 of the Act. These are terms which have had a long and settled construction in Anglo-American transportation law—which construction it is necessary for the Board to disregard, in order to reach its preconceived conclusion that the system is not illegal.

Sections 15 and 17 of the Act prohibit, *inter alia*, common carriers from charging unjustly discriminatory rates.

Section 16 of the Act prohibits, *inter alia*, such carriers from giving undue or unreasonable preferences.

Section 17 of the Shipping Act in this respect has its immediate origin in and bears close resemblance to section 2 of the Interstate Commerce Act, 49 U.S.C. sec. 2,[31] which section was in turn derived from the so-called equality clause of the English Railway Clauses Consolidation Act of 1845.[32]

Section 16 of the Shipping Act—as the Board admits (R. 55)—was patterned after section 3(1) of the Interstate Commerce Act, 49 U.S.C. sec. 3(1), which in turn was adopted from section 2 of the English Railway and Canal Traffic Act of 1854.[33]

It is undisputed that the Alexander Committee in drafting the Shipping Act relied heavily on the previous regulatory experience of the Interstate Commerce Commission.[34]

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[31] The legislative history of the Shipping Act is decisive that Congress intended that two shippers identically situated should not be obliged to pay different rates for the same transportation service. There is no doubt that the unjust discrimination proscription in section 17 of the Shipping Act was intended to apply the explicit proscription contained in section 2 of the Interstate Commerce Act of 1887. See House Hearings on H. R. 14337, 64th Cong., pp. 28-29, 31-32, 40, 84, 88-89, 110, 127, 139; Senate Hearings on H. R. 15455, pp. 146, 242, 243, 249, 250.

[32] See *Texas & Pac. R. Co. v. Interstate Commerce Commission*, 162 U.S. 197, 222 (1895).

[33] See *Interstate Commerce Commission v. B. & O. R. Co.*, 145 U.S. 263 (1892); *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U.S. 197 (1896).

[34] The Committee studied the "decisions and files of the Interstate Commerce Commission." H. R. Doc. 805, 63rd Cong., 2nd Sess. (1914), p. 4. It furthermore hired as consultants two experts on railway transportation, Professors Huebner and Johnson of the University of Pennsylvania, who participated in the drafting of the bills.

In the light of this legislative history, various cases have held that it was the intention of Congress that the settled construction of the earlier Interstate Commerce Act *must* be applied to the Shipping Act, unless in particular instances some thing peculiar in the question under consideration, or dissimilarity in terms of the Acts, requires a different construction. *Inter-Island Steam Nav. Co.* v. *Territory of Hawaii*, 305 U.S. 306 (1938); *United States Navigation Co.* v. *Cunard Co.*, 284 U.S. 474 (1931 *supra*); *Prince Line* v. *American Paper Exports, Inc.*, 55 F. 2d 1053 (1932).

There has never been a judicial decision under the Shipping Act, the Interstate Commerce Act or under any other transportation act, which has held a discrimination in rates to be justified, where two different rates were charged for identical transportation services to similarly situated shippers. Despite the Board's attempt to avoid facing the problem, the exclusive-patronage system involves an admitted situation—which no one can escape—that of a common carrier charging two different rates for the *identical* transportation services to two similarly situated shippers from the same point of origin to the same destination, the higher rate being charged in retaliation for shipper's refusal to give the carrier its exclusive patronage. If this is not unjust discrimination, there is no such legal concept under the Shipping Act.

It is well settled that a discrimination in rates by a *common carrier* can only be "justified by the cost of the respective services, by their values, or by other transportation conditions." *United States* v. *Illinois Central R. Co.*, 263 U.S. 515 (1924). The decisions are unanimous—with no authority to the contrary—that different rates for identical transportation services result in unjust discrimination. *Wight* v. *United States*, 167 U.S. 512 (1897); *Louisville & Nashville Railroad Co.* v. *Motley*, 219 U.S. 467 (1911); *Chicago, Ind. and L. Ry. Co.* v. *United States*, 219 U.S. 486 (1911); *I.C.C.* v. *Delaware, L. & W. Railroad*, 220 U.S. 235

(1911); *I.C.C.* v. *B. & O. Railroad*, 225 U.S. 326 (1912); *Fourche Lumber Co.* v. *Bryant Lumber Co.*, 239 U.S. 316 (1913); *Seaboard Air Line Ry. Co.* v. *United States*, 254 U.S. 57 (1920).[35]

In its hopeless groping for analogies—*there being none*—the Board has hit upon situations which are entirely irrelevant to this factual circumstances of this case. Thus the Board cites in its Report three cases *Eastern Central Motor Carriers Ass'n* v. *United States*, 321 U.S. 194 (1944); *Texas and Pacific Ry.* v. *United States*, 289 U.S. 627 (1933); *I.C.C.* v. *Alabama-Midland Ry.*, 168 U.S. 144 (1897), for the proposition that "carrier competition has been considered a factor to be weighed in justification of a prima facie discrimination or preference" (R. 55). These cases all arose under section 3(1) of the Interstate Commerce Act and concern the charge of unreasonable preference or advantage. *None of the cases involves the charging of different rates by a common carrier for the same transportation service.* Obviously, competition may be a factor in justifying a preference where *different* transportation services are involved. Thus a *motor carrier* may be justified in granting a *volume* discount in order to make its rates competitive with *railroad* rates, which was the situation in *Eastern Central Motor Carriers Ass'n* v. *United States*, *supra*. Similarly, where a carrier is offering a service to City C from both Cities A and B, it may be justified in offering a lower rate from A to C than from B to C, notwithstanding the fact that the distance from A to C may be the same or longer than the distance from B to C, because the carrier encounters competition from other carriers at the former points but not

[35] The cases at common law are in accord with this principle. In *Messenger* v. *Pennsylvania Railroad Co.*, 7 Vroom (36 N.J.L.) 407, 410 (1873), aff'd 8 Vroom (47 N.J.L.) 531 (1874), the Court said: "Recognizing this as settled doctrine, I am not able to see how it can be admissible for a common carrier to demand a different hire from various persons for an identical kind of service, under identical conditions." See also *Menacho* v. *Ward*, 27 Fed. 529, 533 (C.C.N.Y., 1886).

at the latter. *Texas and Pacific Ry.* v. *United States, supra*; *I.C.C.* v. *Alabama-Midland Ry. Co., supra.* The Board has never—*and will never*—find a case,[36] however, holding that competition justifies a common carrier in charging discriminatory rates for identical transportation services in the transportation of the same kind—water, for instance—for shippers, similarly situated at the same point of origin, under identical circumstances and conditions.

Similarly, the Board in its persistent groping hits upon the volume discount, which it considers "highly analogous" (R. 56). The Court of Appeals below has held that the present exclusive patronage contracts are not "requirements" contracts, see *supra* pages 45 and 46. Admittedly "requirements" contracts may have legitimate utility when based upon *bona fide* considerations of cost and value of the services rendered. Cf. *Standard Oil of Cal.* v. *United States*, 337 U.S. 293, 306 (1949). Significantly the Board cites no court decisions to support its unfounded and perverted theory. Moreover, it had found in this very case that:

> "There would, under the dual rate system, be no difference in the cost or value of service rendered to two shippers, one of which is a contract signatory and the other of which is not a contract signatory, although the cargoes might be identical and identically destined." (R. 55).

The exclusive-patronage system has no relation to volume of cargo. The "contract shipper" does not agree to ship any cargo whatsoever—the shipper of one ton of cargo would receive the same rate as the shipper of 100,000 tons, while the non-signing shipper of 100,000 tons would pay the higher non-contract rate on every ton.

The Board's Report further contends that an unjust discrimination—not founded upon any transportation differ-

[36] Other than its own.

ences—can be defended on grounds of conference "self-protection" and "survival" (R. 60). Nothing in the Record nor in the Board's Report, nor elsewhere, supports the proposition that the exclusive-patronage system is necessary for or indispensable to the conference system.[37] Even if the Board's unfounded observation concerning the need for the system were a fact—which it is not[38]—the argument is legal irrelevant. *No one has had the temerity to suggest that the Board could approve the "deferred-rebate system" or the "fighting ship" because of some supposed essentiality of those prohibited devices to the survival of the conference system.* These same arguments of indispensability were offered unsuccessfully in defense of the exclusive-patronage deferred-rebate system before that system was specifically prohibited by the Shipping Act of 1916. In *Thomsen* v. *Cayser*, 243 U.S. 66, 87, 88 (1917), this Court rejected these traditional—and still persisting—arguments of the Conferences that exclusive-patronage arrangements were necessary and were beneficial to commerce in producing regularity of service and stability of rates, in its decision holding the exclusive-patronage deferred-rebate systems, there involved, to be in violation of sections 1 and 2 of the Sherman Act. In that case, this Court answered the plea of the monopolists concerning the claimed beneficial results of their monopoly as follows:

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[37] Ironically enough, the only example furnished by the Record here of "cut-throat" competition, which the system is supposed to avoid, was the rate war started by the Conference itself on March 12, 1953 (R. 12).

[38] There is no support in the Board's findings of fact for the proposition that the exclusive-patronage system is essential for the continuance of the conference system. All evidence is, in fact, to the contrary. According to the Board's own records, of the 125 Conferences under its jurisdiction, only 62 use the system and only 10 of these Conferences have any non-conference competition whatsoever. This very trade has prospered without the use of the system, after the results of the Conference rate war have abated, and remunerative rates restored.

". . . And it finds no justification in the fact that defendants' 'contributions to trade and commerce' might 'have been withheld.' This can be said of any of the enterprises of capital, and has been urged before us to exempt them from regulation even when engaged in business which is of public concern. The contention has long since been worn out and it is established that the conduct of property embarked in the public service is subject to the policies of the law." 243 U.S. at 88.

B. The Board has no discretion ever to approve the system because it involves persons, as parties, who are not subject to the Shipping Act.

Section 15 of the Shipping Act provides for an extraordinary privilege, that of excepting certain agreements from the provisions of the Anti-trust Laws. *Only agreements between "common carriers" and "other persons subject to this Act,"* however, can ever receive such exemption. Shippers, in their capacity as shippers, are neither "common carriers" nor "other persons" subject to the Act as those expressions are defined in section 1 of such Act. *The present exclusive-patronage system involves, as its main and essential constituent, an exclusive-patronage contract to be entered into between the Conference (and its member lines) and shippers.* Such contracts or agreements with shippers as parties cannot be approved by the Board under the clear language of section 15, and consequently *cannot receive any immunity from the Anti-trust Laws.* While the conference system as such, may have immunity from the Anti-trust Laws, the exclusive-patronage dual rate system can never receive such immunity.

Stripped of any color of immunity, there can be little doubt that the system violates Sections 1 and 2 of the Sherman Act, 15 U.S.C., because it is an admitted combination or conspiracy formed with the purpose of restraining commerce, eliminating, suppressing, and preventing competition, and attempting to monopolize the trade. *The Court of Appeals—in the previous appeal of this very*

Japan-Atlantic case—recognized that, unless such agreements can be approved by the Board under Section 15 of the Act, they are "subject to the operation of the anti-trust laws, under which price fixing agreements are illegal per se." Isbrandtsen Company v. *United States*, 211 F. 2d, 51 (1953). Board and Conference Petitions for Writ of Certiorari in that case were denied by this Court, *Japan-Atlantic & Gulf Freight Conference* v. *United States*, 347 U.S. 990 (1954).

Certainly, insofar as the Sherman Act is concerned, the essential purpose of the exclusive-patronage system and the method for accomplishing them are no different than those of the exclusive-patronage deferred-rebate system—which was specifically outlawed by the Act. The case of *Thomsen v. Cayser, supra*—arising before the passage of the Shipping Act—constitutes a clear-cut holding of this Court that the exclusive-patronage systems violate sections 1 and 2 of the Sherman Act.

C. The Board's interpretation of the statute would render Section 15 of the Shipping Act unconstitutional.

There can be no question but that the Board is required to observe a strict interpretation as to the legitimate purview of Section 15 of the Shipping Act, inasmuch as it provides for a departure from prior public policy, the common law, and the provisions of the Anti-Trust laws. The Board's interpretation of the Shipping Act—insofar as such interpretation contemplates possible approval of the exclusive-patronage system—would render Section 15 of the Act unconstitutional, as an unlawful *delegation of legislative authority* in violation of Article 1, Section 8, paragraph 18 of the Constitution of the United States. *Schechter Corporation* v. *United States*, 295 U.S. 495 (1935); *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935); *Fashion Originators' Guild of America* v. *Federal Trade Comm.*, 312 U.S. 457, 465 (1941).

The Board's interpretation would confer upon the Conference, a private cartel, the absolute power to exclude any independent carrier from the trade unless the independent joined the Conference, dominated by foreign lines, and accepted its terms. This would be the equivalent of giving to this private monopoly the power to issue certificates of public convenience and necessity, with no statutory guide for their issuance.

The conferring of such authority on the Board, would, moreover, violate the due process clause of the Fifth Amendment, as exceeding the extent of permissible deprivation of property without *Due Process of Law*. Admittedly, the exclusive-patronage system is intended to achieve and to perpetuate a monopoly for the Conference and to force all independent competition either into the Conference or out of business. "This is coercion by economic pressure. The asserted power of choice is illusory." *United States* v. *Butler*, 297 U.S. 1, 71 (1936).

In *Frost Trucking Company* v. *Railroad Commission of California*, 271 U.S. 583 (1925), the question arose as to the constitutionality of a California Statute which prohibited a motor carrier from operating on the public highways of the State unless he had obtained a certificate of public convenience and necessity as a *common carrier*. The Frost Company was a *contract carrier* and was ordered by the State to suspend operations until a certificate had been obtained. The statute was held unconstitutional by this Court as violative of the due process clause of the 14th Amendment. It was held by this Court that a State cannot consistently with the due process clause require a private carrier to become a common carrier against his will.

Certainly the Federal Maritime Board could not consistently with due process require a non-conference carrier to become a conference carrier against his will.

The vice of the predatory power—passed on by the Board to the Conference—is even more alarming when it is recognized that the exclusive-patronage system would be applicable to "all commodities moving in the trade." It is thus intended to prevent and to suppress all independent competition, *viz., both common carriers and contract carriers or "tramps" alike.* While Petitioner, as a common carrier engaged in regular liner operations, might possibly be able to postpone its elimination from business, if the exclusive-patronage system were to be instituted, by joining the foreign-dominated conference, such a solution is not even open to contract or *tramp carriers* with which operators Conference lines are continuously in competition. Only *common carriers* are subject to the regulation of the Shipping Act, and tramp and other private or contract carriers are explicitly excluded from regulation. The latter carriers are *not*, therefore, eligible to become members of steamship conferences under Section 15 of the Act, thus disposing of the stock answers of the Board and Conferences that the Independent can join the Conference if he sees fit to stay in business.

CONCLUSION

Technically, Petitioners have not brought themselves within any Rule of this Court concerning grounds for granting the instant Petitions. They have no chance of success on the merits, and this Court should not be compelled to hear or consider further arguments thereon or to conduct further proceedings. Because Petitioners have no likelihood of succeeding before this Court on the merits, and because the decision of the Court of Appeals, holding the exclusive-patronage system unlawful in violation of Section 14, Third of the Shipping Act of 1916 is so eminently thorough and sound, and because this Court's answers to the other Questions presented to the Court of Appeals would reach the same result, the *Judgment of the*

Court of Appeals should be affirmed, without any further argument or proceedings. Short of such momentary Review, for the purpose of Affirmance of the Judgment below, the Petitions should be denied.

Respectfully submitted,

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Washington, D. C.
March 4, 1957.

Certificate of Service

I hereby certify that on this 4th day of March, 1957 I served copies of the above brief, personally on all the attorneys for the parties herein and also on the Solicitor General, Department of Justice and on the Federal Maritime Board.

.....

APPENDIX A

STATUTES INVOLVED

A. Pertinent Parts of Shipping Act of 1916 (46 U.S.C. § 801, et seq.):

§ 14 (46 U.S.C. 812):

Rebates and discriminations by carriers by water prohibited; use of "fighting ship"

No common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

* * *

Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

* * *

§ 15 (46 U.S.C. 814):

Contracts between carriers filed with commission

Every common carrier by water, or other person subject to this chapter, shall file immediately with the commission a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner pro-

viding for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The commission may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the commission shall be lawful until disapproved by the commission. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the commission.

All agreements, modifications, or cancellations made after the organization of the commission shall be lawful only when and as long as approved by the commission, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

§ 16 (46 U.S.C. 815):

Discriminatory acts prohibited

* * *

That it shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

* * *

§ 17 (46 U.S.C. 816):

Discriminatory rates prohibited; supervision by commission

No common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the commission finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

* * *

B. § 2 of the Hobbs Act (5 U.S.C. § 1032):

The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, * * * (c) such final orders of the United States Maritime Commission or the Federal Maritime Board, or the Maritime Administration entered into under authority of the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended, as are now subject to judicial review pursuant to section 830 of Title 46.

C. Relevant Parts of the Constitution of the United States:

Article I, Sec. 1:

"All legislative power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Article I, Sec. 8, par. 18:

"The Congress shall have power to * * * make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers * * *."

Amendment, Article V:

"No person shall be held to answer for a capital, or otherwise infamous crime unless, on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

D: Sections 1 and 2 of the Sherman Anti-Trust Act (15 U.S.C. Secs. 1, 2):

SHERMAN ACT[1]

[*Contract, Combination or Conspiracy in Restraint of Interstate or Foreign Commerce Illegal; Penalty*]

Sec. 1. [26 Stat. 209; 50 Stat. 693; 15 U.S.C. § 1.] Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided*, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed

[1] Act of July 2, 1890, c. 647, 26 Stat. 209, 51st Cong., 1st Sess. (S. 2, Public 190), as amended by Act of March 3, 1911, c. 231, 36 Stat. 1167, and Act of Aug. 17, 1937 ("Miller-Tydings Act"), c. 690, 50 Stat. 693, 75th Cong., 1st Sess. (H. R. 7472, Public 314).

by others, when contacts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes", approved September 26, 1914: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

[*To Monopolize, Attempt to Monopolize, Combine or Conspire a Misdemeanor; Penalty*]

Sec. 2 [26 Stat. 209; 15 U.S.C. §2.] Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

APPENDIX B

LAW OFFICES
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Washington

July 1, 1954

Re: Steamship Conferences in foreign trade, illegally using the Exclusive Patronage Contract/non-Contract Dual Rate System, without having first obtained Approval under Section 15 of the Shipping Act, 1916.

Federal Maritime Board
Washington 25, D. C.

Dear Sirs:

One month has now passed since the Supreme Court of the United States, in cases Nos. 700 and 703, rendered its unanimous decision denying Certiorari to the United States Court of Appeals for the District of Columbia, for the purpose of reviewing the decision of that Court of Appeals, in the case of *Isbrandtsen Company, Inc.* v *United States, et al.*, rendered on January 21, 1954 and reported in 211 Fed. 2nd 51. That Decision held that such a System could not be used before it had been filed for approval and approved under Section 15 of the Shipping Act, 1916.

As is well known, the System binds Shippers, and certain Receivers, to give their exclusive patronage to the steamship lines which are Members of the particular Conferences, and to boycott all Independent common carriers, the largest and most important of which is my client, the American concern, Isbrandtsen Company, Inc., which uses American Flag vessels—bought from the U. S. Maritime Commission—in its Round the World and Trans-Atlantic services, especially.

The admitted prime purpose of these Conferences—"Cartels" is the correct name, as applied by our Courts, a former U. S. Attorney General and writers on the subject—is to achieve a monopoly on all the trade routes of the world, in favor, principally, of the Foreign Lines, which dominate all these Conferences on an average of about 10 to 1.

Isbrandtsen is the only American Company of consequence which has not been forced to join these International Cartels, in order to survive, as the shippers are economically coerced into signing the exclusive patronage contracts to enable them to get their goods transported in accordance with their requirements. Any shipper not succumbing to this economic pressure and desiring to retain his recognized freedom of choosing any carrier he may see fit to patronize, is penalized by being required to pay an inordinate higher freight rate than that charged the shippers who sign the exclusive contracts, and as a result such a non-signer is often faced with being put out of business. Such higher non-contract rate varies from 10% of the contract rate to a flat $6 a ton on all commodities.

This old-world, non-American set up, which we have challenged for years, now faces its final show down—thanks to our Courts, but with no thanks to the Maritime Authorities—Conference-minded over the years—despite having been charged with protecting all persons—shippers as well as carriers—concerned with the Commerce of the United States.

Since about 1948, the U. S. Departments of Justice, Agriculture, and sometimes Commerce, have opposed the use of the System, as illegal, both before the Maritime Authorities and in the Courts. The National Farm Organizations have now joined in that opposition.

The admitted impact of this U. S. Supreme Court Decision is best evidenced by the statements of those chiefly affected.

Counsel for the Japan-Atlantic and Gulf Freight Conference; one of the Respondents in the Court of Appeals and one of the Petitioners for Certiorari, in its Reply Brief (p. 2; 3), stated that the Decision of the Court of Appeals holds that "as a matter of law, separate and prior approval of the use of a contract/non-contract tariff is required under Section 15 of the Shipping Act, 1916. The day following the filing of the petition for certiorari in this Court, the Supreme Court of Oregon, relying upon the decision of the Court below, ruled that a conference could not sue a shipper for violation of a contract entered into by the shipper in order to avail himself of a contract tariff, since the use of contract/non-contract tariffs by the conference was illegal, it not having been previously and specifically approved by the Board, *Pacific Westbound Conference* v. *Leval & Co.*, decision filed April 21, 1954 (58 Oregon Sup. Ct. Advance Sheets 677). This decision demonstrates that the practical and far-reaching consequences of the decision of the Court of Appeals for the District of Columbia Circuit—consequences which petitioner outlined in its petition * * * that the decision below is of such general importance to the foreign commerce of the United States and to the administration and construction of the Shipping Act, 1916, as to require its review by this Court." The Supreme Court refused review.

In their Petition for Certiorari (No. 703), Counsel for the Federal Maritime Board stated (p. 4) that one of the "fundamental questions" was

> "Whether Section 15 of the Shipping Act, 1916, requires the Board to give prior, separate approval to contract/non-contract rates of common carriers whose conference agreement, approved by the Board, provides for and contemplates the collective fixing of lawful rates."

Some Counsel for the Maritime Authorities have, from time to time, studiously avoided the use of the word "Sys-

tem," in describing this exclusive patronage dual rate set-up and have stealthily substituted the word "tariffs" or "rates"—which attempt at legerdemain has deceived no Court before which the matter has come. As a matter of fact the said Japan-Atlantic and Gulf Freight Conference is attempting to get the system approved before any "rates" or "tariffs", which will be used, have been arrived at.

Board Counsel further stated (pp. 21-22),

> "There are 105 conferences serving this nation's foreign trade whose basic agreements provide for collective rate-making; of these, 62 conferences employ contract/non-contract rates. Only 9 of these 62 have in their organic agreements an express provision for the use of contract/non-contract rates." [We claim the few general words used do not obviate necessity for approval under Section 15, and the case of *Isbrandtsen Co. v. U. S.*, 81 F. Supp. 544—Appeal dismissed 336 U. S. 941, confirms our contention.] "The great majority have no such express provision, and they are in a position similar to the Japan-Atlantic and Gulf Freight Conference. These 53 conferences presently employ contract/non-contract rates, as did the subject conference pre-war, in reliance upon the Board's long-standing construction of Section 15 that prior separate approval was unnecessary. The consequence of *the decision below would* apparently *render unlawful all such rates, for lack of affirmative approval.*" * * * "the use of contract/non-contract rates, by such conferences, being in the opinion of the Court below *an 'agreement' requiring prior approval, would no longer be exempt from the anti-trust laws* with possible concomitant civil and criminal consequences."

At p. 24, Board Counsel further stated that the result of a denial of Certiorari would be that

> "all contract/non-contract rates will rigidly require prior approval—presumably predicated upon full hearing * * * *The requirement of prior approval would also presumably necessitate review of all existing contract*

non-contract rates so as to permit their use only after specific approval."

The Supreme Court did deny Certiorari.

Counsel for the United States Department of Justice, the principal Respondent in the Court of Appeals, stated in its Brief (pp. 2-3), in opposition to Certiorari, that one of the questions presented was

> "Whether an agreement by a conference of water carriers to adopt a dual rate system is an agreement within the meaning of section 15 of the Shipping Act, and is accordingly illegal unless and until approved by the Board as consistent with the criteria set forth in that section."

And again, (pp. 9-10)

> "On January 21, 1954, the Court of Appeals issued its opinion on the merits (R. 248), holding (1) that the Conference agreement to adopt the dual rate system was clearly an agreement (or a modification of an agreement) required to be submitted to the Board under section 15 of the Shipping Act; (2) that, under that section, such agreements are illegal unless and until approved by the Board; (3) that the Board's action permitting the system to take effect in advance of hearing and determination under section 15 was unauthorized."

Another Conference, Pacific Westbound Conference filed a Motion for leave to submit a brief Amicus Curiae in the Supreme Court, in the matter of the Petition for Certiorari, because on April 21, 1954, the Supreme Court of Oregon had rendered a decision in the case of *Pacific Westbound Conference v. Leval & Co., Inc.*, holding that the exclusive patronage contract non-contract dual rate system used by that Conference was "illegal." In that Oregon case the Court said:

> "We are impressed with the reasoning of the United States Court of Appeals for the District of Columbia Circuit in the case of Isbrandtsen Company, Inc., v.

United States of America and Federal Maritime Board, et al. ..... F. 2d ....., (decided January 21, 1954), wherein it is stated:

> "* * * This pre-approval illegality stems from the fact that the Shipping Act specifically provides machinery for legalizing that which would otherwise be illegal under the anti-trust laws. The condition upon which such authority is granted is that the agency entrusted with the duty to protect the public interest scrutinize the agreement to make sure that the conduct thus legalized does not invade the prohibitions of the anti-trust laws any more than is necessary to serve the purposes of the regulatory statute. But until this is done, the agreement is subject to the operation of the anti-trust laws, under which price fixing agreements are illegal per se.'"

That Oregon Court stated further,

> "We are of the opinion that there must first be formal approval of this practice as to this particular Conference by the United States Maritime Commission before such an agreement is enforceable between the Conference and a shipper. * * * we view the contract as being 'unlawful' and, therefore, unenforceable before approval by the United States Maritime Commission."

Counsel for the Pacific Westbound Conference, commenting on the Decision of the Court of Appeals for the District of Columbia, argued as follows,

> "The decision in the court below means, not only that this conference has been acting illegally * * * but it also means that the conference and other conferences in foreign trade will have to accept an impracticable procedure for obtaining approvals which will constitute a serious obstacle to carrying on their functions."

So the interpretation of the result of the denial of Certiorari by the Supreme Court of the United States is general—that Conferences now using the exclusive patronage contract/non-contract dual rate system, without having

first obtained specific approval under Section 15, are using the System illegally, in violation of said Section, and are subject to the "penalty" therein provided "of $1,000 for each day such violation continues," and we hereby demand that the Board take immediately such steps as shall be necessary to enforce such penalties, and we shall make similar demands on the Department of Justice to do its part. Like the Government Departments, mentioned above, we have always claimed the System can never *be* approved, because it is illegal.

We further point out that said Conferences, so using the System illegally are subject to proceedings against them under the Anti-Trust Laws, because their "agreements" to use the system are not "lawful under this section" (15) and therefore not "excepted from the provisions of" the Anti-Trust Laws, making such conferences subject to all the proceedings—civil and criminal—penalties and recoveries, provided by the Anti-Trust Laws, without any need of any preliminary or Administrative exhaustion proceeding before this Board. Under the decisions just rendered, this Board has no jurisdiction—"primary" or otherwise—no "expertise" is involved. The Courts have again spoken.

The above decisions, now being the Law of the Land, of which the Board and all Conferences have full notice and knowledge, there exists no further excuse for non-compliance. It therefore becomes the sworn duty of this Board —which function should have been performed before this— to enforce that Law, by calling on all those "62" Conferences to cease and desist from further use of this "illegal" System.

Of the "62" (our count is higher) Conferences using the System, we submit that not *one* has filed for, or received, the specific approval under Section 15 made a prerequisite by said Decisions. (Again as you well know, we also contend the Board has no power to *approve* such a system.) Therefore all Conferences using the System should be embraced

within the directives which should be issued by the Board. Any action less than such a blanket order would constitute participation in unethically requiring a multiplicity of suits, in the face of decided test cases and all embracing decisions.

Without, however, any diminution of our contentions above, we now, for ourselves, at this moment, and without prejudice to any further action, we may see fit to take, hereby make specific demand upon the Board that it immediately direct the particular Conferences named on the attached sheet, to which list we may make additions, from time to time—the member lines of which Conferences compete with us, as a common carrier, or with which we have, or have had dealings as shippers—to cease and desist, and at once, from further use of the System, until, at least, any proper filing they shall make, under Section 15, shall have been approved by the Board.

I shall thank you to advise me promptly of the action you are taking.

Respectfully submitted,

John J. O'Connor
Attorney for Isbrandtsen Company, Inc.

Copies generally.

Far East Conference
Gulf French Atlantic Hamburg Range Freight Conference
Atlantic and Gulf West Coast of South America Conference
East Coast Colombia Conference
Atlantic and Gulf-Straits Settlements, Malay States and Siam Conference
India, Pakistan, Ceylon and Burma Outward Freight Conference
North Atlantic French Atlantic Freight Conference
North Atlantic Mediterranean Freight Conference
Trans-Pacific Freight Conference (Hong Kong)
Association of West Coast Steamship Companies

West Coast of South America Northbound Conference
Associated Steamship Lines (Manila) Conference
New York Freight Bureau (Hong Kong)
Straits/New York Conference
Continental U.S.A. Gulf Westbound Freight Conference
Straits/Pacific Conference

FEDERAL MARITIME BOARD
Washington 25, D. C.

July 16, 1954

John J. O'Connor, Esq.
Washington Building
Washington 5, D. C.

Re: Steamship Conferences in foreign trade, illegally using the Exclusive Patronage Contract/non-Contract Dual Rate System, without having first obtained approval under Section 15 of the Shipping Act, 1916.

Dear Sir:

This serves to acknowledge receipt of your letter of July 1, 1954, which letter is receiving serious and considerate study by the Board. Our studies of the problem have not been concluded and, at this writing, we are not prepared to state what course of action will be taken by the Board. Furthermore, there are proceedings now pending before the Board which involve contract/non-contract rates and it may be inappropriate at this time to take a position which might have the effect of pre-judging these matters. In all events, we hope to have an answer to your letter at an early date.

Sincerely yours,

/s/ Louis S. Rothschild
Louis S. Rothschild
Chairman

[Nothing further was ever heard from the Board.]

APPENDIX C

THE EXCLUSIVE-PATRONAGE SYSTEM IS INTENDED TO ELIMINATE AND DOES ELIMINATE COMPETITION.

The Board has on various occasions frankly admitted the unmitigated purpose and inevitable result of the exclusive-patronage system.

The counsel for the Board made the following statement to the District Court in *Isbrandtsen Company v. United States*, 96 F. Supp. 883 (S.D.N.Y. 1951):

> "'That the purpose of the dual-rate provisions was, if possible, to bring about a condition in which an independent carrier [such as Isbrandtsen] would be compelled (through loss or threatened loss of profits) either to join the conference *or go out of business.*'
> "... [I]f a contract system is wholly effective it will *result in a complete monopoly* .... Necessarily, in these circumstances, there would be no service by independent operators."

Similarly, the Board's chairman, in his dissenting opinion in *Trans-Pacific Freight Conference of Japan*, 4 F.M.B. — (December 19, 1955, served on March 5, 1956), made the following comments:

> "In considering an application to institute a dual rate system *in any trade, we must recognize the immediate purpose of the system, simply stated, to be the elimination of non-conference competition, as such,*
>
> * * * *
>
> ..." (Mimeographed Report, page 33.)
>
> "To test the validity of a dual rate system by its effect on independent operators is to permit the tail to wag the dog. ... The non-conference operator's handicaps in the face of a dual rate system, ... are self assumed." (Mimeographed Report, page 34.)

Office - Supreme Court, U.S.
FILED
SEP 30 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 73-74

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE; MITSUI STEAMSHIP CO., LTD., ET AL.,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondents.

REPLY OF RESPONDENT, ISBRANDTSEN COMPANY, INC., IN OPPOSITION TO MOTION OF ASSOCIATED STEAMSHIP LINES (MANILA) ET AL. TO FILE BRIEF AMICUS CURIAE.

JOHN J. O'CONNOR,
423 Washington Building,
Washington 5, D. C.,
Counsel for Respondent,
Isbrandtsen Company, Inc.

JOHN J. O'CONNOR, JR.,
Of Counsel.

OCTOBER 1, 1957.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 73-74

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE; MITSUI STEAMSHIP CO., LTD.; KAWASAKI KISEN KAISHA; NISSAN KISEN KAISHA, LTD.; TOHO KAIUN KAISHA, LTD.; IINO KAIUN KAISHA, LTD.; MITSUBISHI KAIUN KAISHA, LTD.; KOKUSAI KAIUN KAISHA, LTD.; NIPPON YUSEN KAISHA; OSAKA SHOSEN KAISHA, ETD; SHINNIHON STEAMSHIP CO., LTD.; YAMASHITA KISEN KAISHA; WILHELMSENS DAMPSKIBSAKTIESELSKAB; A/S DEN NORSKE AFRIKA-OG AUSTRAILIELINIE; A/S TONSBERG; A/S TANKFART I; A/S TANKFART IV; A/S TANKFART V; A/S TANKFART VI; SKIBSAKTIESELSKAPET VARILD; SKIBSAKTIESELSKAPET MARINA; AKTIESELSKABET GLITTRE; DAMPSKIBSINTERESSENTSKABET GARONNE; SKIBSAKTIESELSKAPET SANGSTAD SKIBSAKTIESELSKAPET SOLSTAD; SKIBSAKTIESELSKAPET SILJESTAD; DAMPSKIBSAKTIESELSKABET INTERNATIONAL; SKIBSAKTIESELSKAPET MANDEVILLE; SKIBSAKTIESELSKAPET GOODWILL; DAMPSKIBSELSKABET AF 1912 AKTIESELSKAB; AKTIESELSKABET DAMPSKIBSSELSKABET SVENDBORG; SKIBSAKTIESELSKAPET IGADP; A/S BESCO; AKTIESELSKAPET IVARANS REDERI; A/S LISE; THE DE LA RAMA STEAMPSHIP CO.; INC.; THE OCEAN STEAM SHIP CO., LTD.; THE CHINA MUTUAL STEAM NAVIGATION COMPANY, LTD.; NEDERLANDSCHE STOOMVAART MAATSHAPPIJ "OCEAN" N.V.; THE SWEDISH EAST ASIA CO., LTD.; WATERMAN STEAMSHIP CORPORATION; LYKES BROS. STEAMSHIP CO., INC.; UNITED STATES LINES COMPANY; STATES MARINE CORPORATION; STATES MARINE CORPORATION OF DELAWARE; DAIDO KAIUN KAISHA; AMERIGAN PRESIDENT LINES, LTD.; *Petitioners,*

—against—

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, ISBRANDTSEN COMPANY, INC., AND EZRA TAFT BENSON, Secretary of Agriculture; *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY OF RESPONDENT, ISBRANDTSEN COMPANY, INC., IN OPPOSITION TO MOTION OF ASSOCIATED STEAMSHIP LINES (MANILA) ET AL. TO FILE BRIEF AMICUS CURIAE.

Statement

The "reasons for withholding consent" [Rule 42(3)] to the proposed filing of such a brief *amicus curiae* are as follows:

Under date of July 3, 1957, Counsel for Isbrandtsen received a letter from a New York City firm of attorneys, Casey Lane & Mittendorf, asking, together with the law firm of Kirlin, Campbell & Keating, of that City, the consent of Isbrandtsen to file such a brief "on behalf of approximately thirty-five steamship conference and their member lines."

Isbrandtsen counsel had no information about the first named law firm, and knew that neither law firm had participated, in any hearing before the Maritime Authorities, within the past nine (9) years involving the use of the exclusive-patronage system. No copy of the proposed brief accompanied said letter to Isbrandtsen's Counsel, who replied he would not consent, "believing the opposition to our side will be adequately presented by the Conference involved and the Government Agency, and that no other Conference or their representatives could contribute further."

For at least the past ten (10) years, during which this issue has been most acutely before the Maritime Authorities and in the Courts, that Agency has been more than diligent and active in defending each and every Conference in its claimed right to employ the dual rate system in the Conference trades, as witnessed by the application herein of the Federal Maritime Board for Certiorari, as heretofore in another case, and its brief herein, of seventy-five (75) pages, signed by five (5) lawyers, not directly, even chiefly, in defense of the right of the particular Conference involved to use the System, but of all Conferences under like circumstances.

Under Rule 42(4) of this Court the Federal Maritime Board could have filed its brief herein, as *amicus curiae*, without the necessity of any consent, and without its being a party to the case. Instead that Agency has retained

"special counsel" appearing on its brief, which Counsel is regularly retained by one of the largest Petitioner steamship lines which belongs to not only the Petitioner conference but to 12 of the so-called Movant conferences, who will undoubtedly argue before this Court, in behalf of all Conferences. This Agency brief was filed at the same time the Conference involved filed its brief of ninety-three (93) pages, signed by eight (8) lawyers.

Those thirteen (13) lawyers for the Appellants have surely covered the field, with little likelihood that six more lawyers, as *amici curiae* "could contribute further."

On August 5, 1957, the Motion to so file a brief *Amicus Curiae* was filed in this Court, with a letter that it had been duly "served" on the parties.

Counsel for Isbrandtsen was not aware that formal service was made on him when one copy of the Motion was left at his New York office, which is not his address in this Proceeding, but upon his return to his Washington office, from vacation, on August 19th, within three days he telephoned the office of the Clerk of this Court and was advised that under Rule 42 he could file an opposition to the Motion "seasonably", which meant at any time before the convening of this Court on October 7, 1957.

It was only on September 24, 1957, on further personal inquiry at the Clerk's office did Isbrandtsen's Counsel learn that such proceedings for leave to file are treated as "Motions" and should be answered within twenty (20) days, which would have expired on August 20, 1957, and that any answer to matters in the brief should be included within said opposition—information which was new to Counsel.

For the foregoing reasons Isbrandtsen's Counsel respectfully requests that the Court accept and consider this reply in opposition despite its being filed late under some technicality of the Rules.

A. OUR OPPOSITION TO THE MOTION

In answer to the Motion of the Associated Steamship Lines (Manila) et al. for leave to file a Brief *amicus curiae*, Respondent, Isbrandtsen Company, Inc., states the following:

The movants have stated no valid reason why they should be allowed to file a Brief *amicus curiae* herein, and they would seek only to subvert the office of an *amicus curiae* for the use of litigants already in this case and also seek to confuse the legal issues and distort the facts of record before this Court.

There are compelling and basic reasons why the instant Motion is defective and why it should be promptly denied by this Court, viz.:

I. THERE IS MISREPRESENTATION AS TO THE PERSONS TO BE REPRESENTED IN THE BRIEF AMICUS CURIAE.

The following first statement in the Motion is not correct, to wit, that the listed "one hundred fifteen common carrier steamship lines comprise (the) membership of 'the thirty-five conferences' " for the reason that said list of 115 does *not* include the steamship lines which are already parties to this appeal and which are listed on the cover and on the first page of the Motion. Those parties already in the case belong to one or more of said 35 conferences, for which this special plea, by way of *Amicus Curiae*, is to be made, and thus would have triple representation before this Court, by 19 lawyers, instead of the 13 already appearing—the lawyers for the Conference involved, the lawyers for the Board and by the lawyers making the Motion.

Therefore the statement on page 2 of the Motion that—

> "None of the moving steamship lines are parties to this action"

is as deceitful, as is the statement on page 4 of the Motion, that the "dual rate systems" of the movers "have been maintained over many years . . . with general recognition by Congress." For 41 years Congress has taken no action whatsoever, pertaining to the System.

II. THE MOVERS BOLDLY ADMIT THEIR PURPOSE IS TO GO FAR OUTSIDE THE RECORD IN THIS CASE.

On page 5 of the Motion this extraordinary, but frank statement is made.

> **"The parties to the case in the Court below and in this Court must necessarily concern themselves with the specific issues of the case. Movants believe that these issues need to be considered within a larger economic and historic framework than the petitioners and respondents could develop for the Court."**

That admission, in itself, should be sufficient to cause the denial of this Motion.

Such a statement surely does not comply with the requirements of Rule 42(3) that the Motion

> "shall concisely state the nature of the applicant's interest, set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties and their relevancy to the disposition of the case."

At the time of filing the Motion, the Movers had no information as to what "facts or questions of law . . . have

not been, or reasons for believing that they will not be adequately presented by the parties", etc., because the briefs of the Appellants, Conference and Board, were not filed until October 12 and 13, 1957, and we are confident that the Movers had not, on August 5, 1957, seen any drafts of said briefs.

III. MOVANTS WOULD SEEK TO SUBVERT THE OFFICE OF AN AMICUS CURIAE FOR IMPROPER PURPOSES.

1. Ordinarily, within the discretion of the Court, an attorney or other person may appear as an *amicus curiae* provided he is not partisan. The principles relating to the function and office of an *amicus curiae* are of long standing. It is well settled that the proper function of an *amicus curiae* is to assist and advise the Court, but such office cannot be subverted to the use of a *party* in the case. *Walker County Lumber Co.* v. *Edmonds*, 298 S. W. 610. Moreover, an attorney cannot appear as an *amicus curiae* if he is partisan, *Central Hanover Bank & Trust Co.* v. *Saranac River Power Corp.*, 278 N.Y.S. 203, and, of course, a regularly employed attorney of a party cannot appear as *amicus curiae*.

Not only are the present Movants partisan, but a substantial part of their membership is already represented as parties in the case, and *some of the attorneys listed on said Motion are regularly employed representing those 35 conferences, including the members thereof who are the present Petitioners.*

Of the thirty-five (35) conferences listed as the Movants, twenty-eight (28) conferences include as members one or more of the lines which are members of the Japan-Atlantic and Gulf Freight Conference, the chief Petitioner herein. Counsel for the Movants have conveniently and deliber-

ately eliminated the petitioner steamship lines from their Appendix A, which purports to list the common carrier steamship lines which are members of the Movants, but these facts are of public and official record at the Federal Maritime Board. Actually all of the Petitioner steamship lines should have also been listed in Appendix A to the Motion, which would demonstrate that seventeen (17) steamship lines were seeking to be in the unprecedented position of being in the case as parties and also as *amici curiae*.[1]

The grave impropriety of this Motion is astounding. Petitioners, Conference and steamship lines, are already fully represented by three sets of attorneys, plus the Federal Maritime Board, also a Petitioner.

Further, under our Point II supra, we point out that it is at least rather novel that Movants dare to seek to have greater rights than the parties to this case in presenting factual arguments to this Court. The parties have agreed to be confined to the facts of record before this Court, which limitation, as well as the issues, was laboriously worked out in a prehearing Stipulation encompassed in an Order and in an Amended Order in the Court below (R. 229, 234). Certainly it is well accepted that the right of an *amicus curiae* to be heard at this final stage of Appeal, in a matter which began in 1952, must be based on the Record before this Court (R. 153). Manifestly, the "*petitioners* and *respondents* will not," and cannot present arguments completely outside the Record, because they are confined to the issues and facts in the administrative Record now before

[1] The official records of the Board do not reflect any action of Petitioner steamship lines in withdrawing as members of the various Movant conferences. There is no way, of which we are aware, that only part of a Conference could be represented, nor have Counsel for Movants undertaken to present any such theory, rather have they attempted to evade their dilemma of double representation.

this Court. Movant Conferences, however, comprising also the Petitioner steamship lines, seek the extraordinary privilege of presenting to this Court extra-record factual arguments, even though the same be unfounded and possibly untrue.

B. THE PROPOSED BRIEF AMICUS CURIAE

At the outset of its brief in its "Statement of Interest", Movants state:

> "The parties on behalf of whom this brief amicus curiae is filed are thirty-five Conferences, Pacific American Steamship Association, . . ., and their common carrier member lines, operating to and from all the major ports of the United States in foreign commerce."

This is a repetition of the deception advanced in their Motion. In their claim of representing the "common carrier steamship Member lines" of said 35 conferences, and one Association, it is again apparent that they are attempting to represent, *amicus curiae*, seventeen (17) "member lines" who are already represented as petitioners and parties in this proceeding.

A cursory examination of the proposed Brief *Amicus Curiae*—and we do not feel called upon to do more—reveals purported factual arguments of the most contentious type, *without one single record citation.* Many of these fantasies presented have previously been disproven by Counsel for Isbrandtsen in the proceeding now before this Court.

Isbrandtsen has no desire to explore at length the many misstatements of fact and law which appear in the Brief, *Amicus Curiae*. The so-called legal arguments therein are so illogical, unsupported and even incoherent as to deserve no answer whatsoever. For example, proposed brief pp.

14 and 27, great emphasis is placed upon a so-called "Report" of the "Senate Committee on Interstate and Foreign Commerce" in 1950. That "Report" is in fact a document by "Mr. Magnuson *from* the Committee move . . ." and the "Committee" itself states that it "submit(s) the following *by* Senator Magnuson". Nowhere in said "Report" is there any indication of any hearings or the taking of any testimony, nor of any action even by the Subcommittee, of which Senator Magnuson was one of five (5) members, let alone any action whatsoever by the full "Committee". It is contended in the Brief that the "Senate Committee" in this "Report" gave some sort of endorsement to the exclusive patronage system, and found that it "appear[s] to be in the public interest" (Ibid., page 27). The argument is patently fallacious even if a report of a Congressional Committee, not relating to any legislation, and without any findings or recommendations on the subject, were possibly relevant.

At page 85 of said "Report", the litigation in the Courts concerning the exclusive patronage system is specifically noted, and the statement is made that, "Pending a decision by the Courts as to the legality of the practice, the *sub*committee does not believe it advisable to comment definitely upon this phase of the matter." Naturally, Senator Magnuson did not, after making such a disavowal, proceed to "endorse" the exclusive patronage system in any manner whatsoever. Also, at page 85 of the "Report", it is noted that it may be justified to allow carriers to participate in a "*conference* arrangement". Such is not an exclusive patronage system, and it is further stated that "*conference* arrangement[s] . . . would appear to be in the public interest." The present controversy before this Court does not concern the *Conference* system as such, which the Brief, *Amicus Curiae*, confuses and fails through-

out to distinguish from the dual rate system. The question at issue here is the legality of the exclusive patronage system which Petitioner Conference and its member lines would seek to employ. The above quotation is conveniently tailored in the Brief, *Amicus Curiae*, as if it applied to the exclusive patronage system rather than the Conference arrangement, by changing the subject of the sentence from "conference arrangements" to the "dual rate system" without quotes, of course.

There is nothing new in the way of any legal argument presented in the Brief *amicus curiae*. Every case, statute or writing cited in said brief, directly or indirectly concerning the exclusive-patronage system has been cited, analyzed and commented on at great length in the Board's 50 page Report (R. 19 to 69) and in the briefs of the Conference and its member lines and the brief of the Board except possibly the 1894 New York case, at common law, *Lough* v. *Outerbridge*, (143 N. Y. 271), (1894) which has previously received full discussion in the Board's determinations even though it antedated the 1916 Act by 22 years. See *Contract Rates—North Atlantic Continental Freight Conf.*, 4 F. M. B. 355 (1954).

The proposed brief also refers to *U. S.* v. *Prince Line*, 220 Fed. 230 (1915, before the 1916 Act) involving the *deferred* rebate system. That case, however, was reversed by this Court, as moot.

The proposed Brief *amicus curiae* contains only the most superficial discussion of the law which might be relevant to the case, which discussion is hardly worthy of any opponent's consideration, much less that of this Court. The entire approach of these Movants is as if the issue were *de novo*, and counsel on said proposed brief appear to be unfamiliar with what has been decided since 1916, either by the Maritime Authorities or by the Courts.

Rather than contributing to any real and thorough consideration of the issues involved and so long sought by Respondents to be determined, this proposed brief would relegate the discussion to the admitted confusion of at least a generation ago.

WHEREFORE, it is respectfully prayed by Respondent, Isbrandtsen Company, Inc., that this Court deny the aforementioned Motion to file a Brief *amicus curiae*.

Respectfully submitted,

JOHN J. O'CONNOR,
423 Washington Building,
Washington 5, D. C.,
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OCTOBER 1, 1957.

CERTIFICATE

I, John J. O'Connor, Counsel for Isbrandtsen Company, Inc., and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 1st day of October, 1957, I served copies of the foregoing Reply on counsel for all parties of record by mailing copies to their offices in duly addressed envelopes with postage prepaid, or by delivery to them in person.

JOHN J. O'CONNOR.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 73-74

FEDERAL MARITIME BOARD,
Petitioner,
v.
ISBRANDTSEN COMPANY INC., UNITED STATES OF AMERICA, ET AL.,
Respondents

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE, MITSUI STEAMSHIP CO., LTD., ET AL.
Petitioners,
v.
UNITED STATES OF AMERICA, ET AL.,
Respondents

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT, ISBRANDTSEN COMPANY, INC.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 73

FEDERAL MARITIME BOARD,

Petitioner,

v.

ISBRANDTSEN COMPANY, INC., UNITED STATES OF AMERICA, AND SECRETARY OF AGRICULTURE,

Respondents.

No. 74

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE, MITSUI STEAMSHIP CO., LTD., ET AL.

Petitioners,

v.

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, ISBRANDTSEN COMPANY, INC. AND SECRETARY OF AGRICULTURE,

Respondents

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT, ISBRANDTSEN COMPANY, INC.

Opinion Below

The opinion of the Court of Appeals (R. 237-248) is reported at 99 U.S. App. D.C. 312, 239 F. 2d 933.

Jurisdiction

The judgment below was entered on November 9, 1956. Petitions for writs of certiorari were filed by the Federal Maritime Board on January 24, 1957, and by the Japan-Atlantic and Gulf Freight Conference and its member lines on February 1, 1957, and were granted on March 25, 1957 (351 U.S. 994; 353 U.S. 908).[1] The judisdiction of this Court is conferred under 62 Stat. 928, 28 U.S.C. § 1254(1).

Statutes Involved

The statutes and sections of the Constitution involved are the Shipping Act, 1916, as amended, 46 U.S.C. § 801 et seq., the Constitution of the United States, Article 1, § 8, par. 18 and Amendment V, and the Sherman Anti-Trust Act, 15 U.S.C. §§ 1, 2. The relevant sections of these statutes and of the Constitution are set forth in Appendix A to this brief.

Questions Presented

The conference practice under review, which the Court of Appeals has by its decision condemned as illegal, is the so-called exclusive patronage contract/non-contract dual rate system (hereinafter sometimes referred to as the "exclusive-patronage system" or the "*pre*ferred-rebate system"), under which common-carrier members of a steamship conference, acting in concert, charge one set of rates to shippers who agree

[1] Isbrandtsen is replying in this Brief to the respective Briefs of the Federal Maritime Board and the Conference, which Briefs together total some 168 pages. All emphasis appearing in quotations herein has been supplied.

to ship all of their cargo exclusively on the vessels of the Conference lines (i.e. to boycott all non-conference carriers) and charge an arbitrarily-fixed higher set of rates for identical transportation services to shippers who do not enter into such exclusive-patronage contracts, the admitted and avowed purpose of said system being the elimination of non-conference or independent competition and the monopolization of the trade by the conference lines.

The following questions concerning this system were presented to the Court of Appeals:

> "1. Whether the employment of the so-called exclusive patronage contract/non-contract dual rate system under which common-carrier members of a steamship conference acting in concert, charge one set of rates to shippers who agree to ship all their cargo exclusively on the vessels of the conference lines, and charge a higher set of rates for identical transportation services to shippers who do not enter into such exclusive patronage contracts is unlawful under, or in violation of sections 14, 15, 16, and/or 17 of the Shipping Act, 1916, so that the Federal Maritime Board under section 15 of said Act, lacks authority to approve an agreement, understanding or arrangement entered into by the members of such a conference for the use of such a system?
>
> 2. Whether such a system violates the various provisions of the Anti-Trust laws or any other pertinent statutes, including the question whether the system could ever be legally approved under section 15 of the Shipping Act, because that

section can exempt from the Anti-Trust laws only agreements between carriers and "other persons" subject to the Act, whereas the fundamental part of this system is a so-called exclusive patronage contract between conference lines and shippers, who are neither carriers nor "other persons" subject to the Act?

3. Whether the Board could, in any event, approve the use of the exclusive-patronage-contract-dual-rate system in the particular trade herein involved on the basis of the facts existing in the administrative record as found by the Board itself?

4. Whether the Board, in approving such a system under section 15 of the Shipping Act even assuming the legality of such a system, must have before it a clearly stated "agreement" or "understanding" between the common carriers involved, including the actual rates which would be charged by such conference carriers pursuant to their concerted action?

5. If section 15 of the Shipping Act, 1916, should authorize the Board to approve such a system, whether such section of the Act would thereby be rendered unconstitutional under the Due Process clause or other provisions of the Constitution by reason of the fact that it would give the Board and/or Conference the power to force the independent carrier or carriers either out of the trade or into the conference and/or permanently prevent independent competition from entering the trade by making non-conference competition economically impossible?"

The Court of Appeals found it unnecessary to go beyond the issues in Question 1, in view of its holding that the system was fundamentally illegal under Section 14, Third of the Shipping Act. Even under this first question, the Court below did not decide, therefore, the serious challenge of illegality under Sections 15, 16, and 17 of that Act. We stress to this Court the importance of those remaining issues under Question 1, as well as the importance of the issues raised in the succeeding questions, particularly questions 2 and 5.

Statement of Case

A. Background of the Controversy

Isbrandtsen has long contended that the admitted and basic facts concerning the exclusive-patronage system present a situation whereunder the use of that system would be unavoidably illegal under the Shipping Act, 1916, as amended, as well as in violation of various other statutes and the Constitution of the United States. For purposes of presenting the issues of law in their simplest form, Isbrandtsen entered into a stipulation, in the Court below, to limit the facts, for purposes of review, to those "existing in the administrative record as found by the Board itself" (R. 229-235), even though the Board's decision was in favor of the use of the exclusive-patronage system by the Conference, and even though Isbrandtsen has contested the validity of many of the Board's findings.

The present case is the culmination of lengthy and expensive efforts by Isbrandtsen to present these legal issues to the Courts for final and definitive decision.

For the last ten years, Isbrandtsen has been attempting to obtain such a decision of the legality or illegality of the exclusive-patronage system, which decision has now been rendered by the Court below. In these efforts, Isbrandtsen has been joined by the United States Departments of Justice and Agriculture, which departments have similarly contended that the system is fundamentally illegal.

The faulty and inadequate administrative procedures of the Federal Maritime Board have made it exceedingly difficult to present the basic legal issues to the Courts. Isbrandtsen and the Departments of Justice and Agriculture have been confronted with a situation, perhaps not uncommon in regulatory agencies, where powerful members and combines of the industry to be regulated in effect have secured undue attention in the framing by the agency of its policies and decisions. The Board accordingly has consistently denied the necessity of regulating these powerful and foreign-controlled steamship monopolies and has even disclaimed its power to do so.[2]

Throughout the many years of this litigation, both before the Board and the Courts, the Board has been the most outspoken supporter of the system, and has actively endorsed and espoused the system in every case

[2] During the period when various formal adjudicatory proceedings have been pending before the Board, certain Board Members, including the present Chairman, have made various public statements and speeches to industry groups in favor of the exclusive-patronage system. The Board's statements on the subject have lacked any consistency but an attitude favoring non-regulation of steamship conferences has long been evident. See *infra*, pages 139 to 147.

that has gone to Court, rather than appearing merely as *amicus curiae*.

Confronted with this anomalous situation of administrative inertia, plus preconceived opposition, it has not been easy to compel the Board to go through even the formalities of an adequate administrative hearing so as to present a proper case for judicial review. Since 1947, it has been only the relentless efforts of Isbrandtsen and the Departments of Justice and Agriculture that have been responsible for Court decisions forcing the Board to go through some perfunctory—though unavailing—gyrations in the regulation of these shipping cartels.

At the outset of its attack in the Courts against the use of the exclusive-patronage system, Isbrandtsen was confronted with the necessity of exhausting its administrative remedies before the Board. In *Isbrandtsen Company v. United States*, 81 F. Supp. 544 (S.D.N.Y., 1948), an injunction was granted to Isbrandtsen by a three-judge Statutory Court, restraining a Board order, issued without hearing, purporting to allow the Eastbound and Westbound North Atlantic Continental Conferences to institute the system, which injunction was conditioned upon Isbrandtsen's diligent prosecution of a complaint before the Board. An appeal by the *Board* and the Conferences to this Court was dismissed sub nom. *A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Company*, 336 U. S. 941 (1949). After lengthy proceedings before the Board, upon Isbrandtsen's complaint, the Board's decision dismissing the complaint was held invalid by the Statutory District Court because of the Board's obvious and fatal failure

to make constitutive, basic, or pivotal findings, which would support its conclusion. *Isbrandtsen Company* v. *United States*, 96 F. Supp. 883 (S.D.N.Y., 1951), affirmed by an equally divided Court, sub nom. *A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Company*, 342 U. S. 950 (1952).

In the previous judicial proceedings in this case, the Board, which sought to allow the system to go into effect without any opportunity for hearing, had argued that an agreement between conference carriers to employ the exclusive-patronage system was not an agreement under section 15 of the Shipping Act and required no Board approval for its effectiveness. This remarkable contention by the Board was quickly dispelled, and an injunction against the use of the system was issued by the Court of Appeals for the District of Columbia Circuit until the Board had met its formal statutory requirements of holding a hearing and issuing its approval or disapproval of what was obviously an agreement, *Isbrandtsen* v. *United States*, 211 F. 2d 51 (D. C. Cir., 1954). Once again, petitions for certiorari to this Court by the Board and the Conference were denied, sub nom., *Japan-Atlantic and Gulf Freight Conference, et al.* v. *United States, et al.*, 347 U. S. 990 (1954).

The Court decisions have had little effect upon the Board, other than various meaningless verbalizations in its Reports and some rather absurd regulations adopted in a frantic and obvious effort to meet what it considered the mere formal requirements of administrative action as announced therein. After the affirmance of the decision of the Statutory District Court in *Isbrandtsen Company* v. *United States, supra*, and in

purported compliance with that decision, the Board promulgated its General Order 76, 46 C.F.R. 236 (November 10, 1952), requiring in substance that Conferences using or seeking to use the system state the basis for the spread or differential and the reasons for the use of the system in the particular trade involved. The spreads used by the sixty-two (62) Conferences employing the system vary, in percentages from 9½ to 31 per cent, and in flat dollars per ton of cargo from $3 to $9.[3] It was contemplated by the Board, that such filings of self-serving *ex parte* statements by the conferences would somehow satisfy the decision of the Statutory District Court and obviate any necessity of approving the agreements involved. No action was ever taken by the Board in reference to said sixty-two (62) filings. They were simply marked "Filed". This fantastic attempt to "approve" by inaction, or "implication"—a traditional approach by the Board, of course—was dispelled in the previous appeal to the Court of Appeals involving the present conference, *Isbrandtsen v. United States, supra.*

Administrative proceedings under the Board's General Order 76, although lengthy and expensive, have been futile, amounting to little more than an incantation by Conference witnesses that the system was needed to eliminate and prevent independent competition and to allow conference carriers to maintain

---

[3] Some conferences using the system employ a flat dollar differential between contract and non-contract rates irrespective of the rates involved. Other conferences use a particular arbitrarily selected percentage for the differential which means that the dollar amount of the spread will vary as between different commodities having different rates.

stable and uniform rates,[4] a result which any monopoly can obviously effectively achieve. As to the "basis of the spread", the usual support was that the percentage or differential represented the "best business judgment" of the conference and carriers involved.

The Board's compliance with the decision of the Court of Appeals, however, holding that every exclusive-patronage system was an "agreement" requiring Board approval before it could be used, has not been the subject of even such minimal formal acceptance of attention by the Board. Except for this very case now before this Court, where the Conference is under a permanent injunction not to use the system, the Board has taken no steps whatsoever to comply with the decision of the Court of Appeals, which was affirmed by this Court. In one other case, the Board has approved the use of the system, by the North Atlantic Continental Freight Conference, after hearing on the protests by the Departments of Agriculture and Justice and by

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[4] Testimony in these proceedings before the Board on behalf of the conferences has been largely confined to conference officials or employees or officers of the member lines. Only occasionally have shipper witnesses appeared, a result which is not surprising in view of the tremendous economic pressures wielded by these powerful conferences. The reluctance of independent shippers to testify against these powerful shipping cartels has been well known (See footnote 26, *infra*, p. 40). Nevertheless, in Board Dockets 725, 751, involving a complaint against the system instituted by the Secretary of Agriculture, officials of the United States Department of Agriculture, the largest shipper in the world, and representatives of five farm organizations, representing hundreds of thousands of American shippers, appeared to testify in opposition to the system. *Secretary of Agriculture* v. *N. Atlantic Continental Freight Conf.*, 4 F.M.B. — (1956). Such testimony in opposition to the system has been given no weight whatsoever by the Board (See infra, p. 39).

Isbrandtsen. *Secretary of Agriculture* v. *North Atlantic Continental Freight Conference*, 4 F. M. B. — (1956). That case is now pending review sought by the Secretary of Agriculture in the United States Court of Appeals for the District of Columbia Circuit. Despite the decision of the Court of Appeals, requiring Board Approval of all such agreements, the anomalous situation exists where the Board allows some sixty-one (61) conferences to use the system, without Board approval, in direct contravention of that decision, and two almost contemporaneous decisions concurring with that decision, *Pacific Westbound Conference* v. *Leval*, 269 P. (Ore.) 2d 541 (1954) and *River Plate and Brazil Conference* v. *Pressed Steel Car Co.*, 222 F. 2d 369 (C.A. 2, 1955). Isbrandtsen has repeatedly complained about this flagrant disregard of the law by the Board but has received no intelligent reply and no action whatsoever. Sixty-two (62) conferences presently use the exclusive-patronage system, or about half of the conferences on file with the Board, and to Isbrandtsen's knowledge, only one of these conferences has ever had its agreement to use such system approved by the Board —a matter readily ascertainable by the Board from its files—and, as pointed out above, that one approval is under review upon the Petition of the Secretary of Agriculture in the Court of Appeals for the District of Columbia Circuit. In other words, all of these conferences are presently employing the system illegally without even the color of formal Board approval.

The Board's reluctance and refusal to follow the decisions of the Courts is not surprising, for it does not even follow its own decisions, which have been conflict-

ing and inconsistent.[5] It has repeatedly emphasized that the exclusive-patronage system could only be used where competitive conditions presented by non-conference carriers so warranted. *Japan-Atlantic and Gulf Freight Conference*, 4 F. M. B. — (December 14, 1955); *Trans-Pacific Freight Conference of Japan*, 4 F. M. B. — (December 19, 1955). The Affidavit of Lloyd Tibbott, Chief of the Board's Regulation Office, filed with the Court of Appeals in this proceeding, however, states that only eight (8) of the sixty-two (62) conferences using the system have any independent competition whatsoever.[6] Mr. Tibbott's Affidavit is dated December 23, 1955. Since that time, there has been a further attrition of even the exceedingly minor independent competition that was listed therein. The Mitsui Steamship Company, a Petitioner herein, listed as a non-conference operator in the "Pacific Coast-Europe" trade has since joined the Conference, as has the other independent operator in that trade. Isbrandtsen, moreover, which is listed as an independent operator in the Atlantic-Malay States, Atlantic-Far East, and Pacific Coast-European trades carries virtually no cargo in those trades. Of the sixty-two (62) conferences using the exclusive patronage system, therefore, only seven (7) have even a claim that there is independent competition. In the face of such facts, the verbal and meaningless plea, reiterated on pages 31 and 32 of the Board's Brief, that the Board

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[5] See pages 139 to 147, *infra*.

[6] The Affidavit of Mr. Tibbott lists ten (10) trades in which the system is used, but four of these so-called trades are controlled by only two (2) conferences.

will protect Isbrandtsen and other independents is the sheerest and most patent nonsense. Once independent competition has been eliminated, it is usually gone for good, and the Board sits back in its traditional complacency of non-regulation, adopting a policy of what it has consistently referred to as conference "self-regulation." This "self-regulation" of course, amounts to the predatory destruction and perpetual suppression by the monopolists of all non-conference carriers. How well they have succeeded is illustrated by the figures above supplied by the Board's Chief of Regulation.

This is the background in which the present proceeding arises, with the present case constituting the culmination of years of fruitless protests by Isbrandtsen and the Departments of Justice and Agriculture within the morass of administrative rigmarole and inertia.

B. The Parties.

Respondent, Isbrandtsen Company, Inc., is a domestic corporation, organized under the laws of the State of New York, and is an operator of many vessels of United States-flag and registry. As a part of its Eastbound Round-the-World Service, in which Isbrandtsen employs United States-flag vessels exclusively in the conduct of its common-carrier service, its vessels offer a regular fortnightly service for the carriage of cargo from Japan, Korea and Okinawa to ports on the Atlantic Coast of the United States.[7] Isbrandtsen, by its own choosing, has maintained a policy of not en-

[7] Neither the vessels of the Conference nor the vessels of Isbrandtsen, of course, engage in this trade alone. Isbrandtsen's vessels, operating on its Eastbound Round-the-World Service, proceed from

tering into so-called "conference agreements" with other carriers concerning the fixing or regulating of transportation rates or fares or concerning the controlling, regulating, preventing, or destroying of competition among the members of such conferences.

In Isbrandtsen's freight service from Japan, Korea and Okinawa to the Atlantic Coast of the United States, the company competes for cargo directly with Petitioners, the members of the Japan-Atlantic and Gulf Freight Conference (hereinafter called "the Conference"), a private association of seventeen *common-carrier* steamship lines, having its principal office in Japan. The Conference is composed of twelve foreign-flag lines (eight of which are Japanese), and although nominally there are five United States-flag members, one of them serves Gulf ports only, another returns in ballast (without cargo) and another returns to the United States via the Suez Canal, which longer route is a detriment to the carrying of any cargo from the Far East ports served by the other Conference lines. (R. 26, footnote 7).

Insofar as they are active in the trade, *each Conference line operates as a common carrier by water.* Because the vessels of each member line of the Conference regularly call at United States ports for the discharge

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North Atlantic ports of the United States to Mediterranean ports, *via the Suez Canal* to Red Sea ports and ports in India and Pakistan, and then to the Far East including ports in the Philippines, Malay provinces, Japan and Formosa. The Conference vessels, after going to the Far East Westbound through the Panama Canal, most of them being members of the Far East Conference (F.M.B. Agreement No. 17), on that leg, return through the Panama Canal after loading cargo at the Philippines and sometimes at Hong Kong before taking on cargo at Japan for carriage to Pacific, Gulf and Atlantic ports in the United States.

and loading of cargo, the Conference lines are subject to the jurisdiction of the laws of the United States (R. 25).

The Conference and its member lines purport to act in concert and to operate pursuant to a conference agreement, F.M.B. No. 3103, first approved by a predecessor agency of the Federal Maritime Board in 1934 (R. 24, 39). The basic agreement permits the establishment and fixing of *uniform* rates as between conference lines, *but it has never contained language authorizing, or purporting to authorize, the use of any exclusive-patronage system* (R. 24). Notwithstanding this lack of approval by the Board the Conference employed the system illegally from 1928 (first on a few commodities only) until 1941 (when the Second World War forced the suspension of private shipping operations) and was thereby able, as the Board has found, to eliminate or suppress independent or non-conference competition (R. 25).[8] It should be noted that this Conference, organized in 1926, (R. p. 182, Ex. A),

[8] The Board's Report finds that "the pre-war differentials between contract and non-contract rates ranged from 12% to 66⅔% of the contract rates" (R. 25). The Conference and the Board have argued on various occasions that this period of illegal monopolistic activity was responsible for the "stability of rates." Such astonishing arguments have not been repeated in the present Briefs of Petitioners. Incredibly, however, the Conference was still gloating over its own illegalities as recently as its present Petition for certiorari filed with this Court, wherein it stated, that "Prior to World War II [the Conference] had employed a dual-rate system and thereby *brought about* stability of rates" (Conference Petition, page 4). Such a result we agree did take place by the elimination and suppression of all non-conference competition, so that every shipper was compelled to sign exclusive-patronage contracts in order to obtain the lower contract rates. The "non-contract rates" were, therefore, merely paper rates.

ten years after the Shipping Act, first employed a dual-rate system twelve years after that Act was passed.

Isbrandtsen's reasons for not wishing to join this or any other foreign-dominated steamship conference are compelling and important to it. The company has considered that it has the right to be free from such entangling alliances with other carriers—overwhelmingly foreign lines—which as a normal business practice should be its competitors. Neither the Board nor the Conference is willing to recognize this right of free enterprise, and they have implied that certain insidious motives are to be attributed to any carrier who would not succumb to the conference system.

A vital consideration influencing Isbrandtsen's determination to remain independent, and not to join any conference, has been the fact that practically all conferences are overwhelmingly dominated by foreign-flag lines, leaving the American lines in an ineffective minority in voting upon conference action on such important matters, for example, as the establishment or rates and regulations, the establishment and provisions of a dual-rate system and the opening of rates, or other action such as the institution of a rate war of the type which the Conference here involved began, with the result that American lines, with their high cost of operation, would suffer most, a result in this particular instance, so often elaborated upon by both the Board and this Conference in their Briefs.

The result of ineffective United States-flag influence under a conference agreement providing for a majority vote—the proportion ordinarily provided in such agreements—would similarly occur, in practically all

instances where a two-thirds vote was required, as well as in the case of this Japan-Atlantic and Gulf Freight Conference Agreement (F.M.B. No. 3103), said agreement being referred to in the Brief herein of the Conference, at page 4 and elsewhere. Under that Conference Agreement (R. 137), it is provided in paragraph 1(d) thereof that:

> "At meetings of the Conference for considering the scale of rates to be adopted or any revision of the scale in effect or for any other purpose (except as referred to in Par. 4) each of the parties hereto shall be represented by one representative, but in the event of a representative being unable to attend, such party may vote by proxy on notification thereof being lodged with the Secretary of the Conference and the decision of the Conference must be by a majority of not less than two-thirds of all the members of the Conference, it being agreed and understood that all decisions shall be effective and binding on all parties hereto."

This Conference has a total of seventeen (17) members of which twelve (12) are foreign lines, and five (5) are American lines. Under the provision quoted, therefore, two thirds of the total would be twelve (12), and a majority of that two-thirds would be seven (7), leaving, at all times, the five (5) American lines numerically ineffective. Moreover one of the American-flag Lines "is not entitled to vote" (R. 30, footnote 10).

Further reasons for Isbrandtsen's refusal to join the Conference and to relinquish its business independence to the concert composed of predominantly foreign-flag

carriers are readily apparent, even in the Board's Report. The Conference carriers themselves have not maintained the rates which they have purportedly agreed upon, and an American-flag carrier such as Isbrandtsen, who would choose to abide by any agreements it may enter, would in many instances be charging the highest rates in the trade. The evidences of this illegal rebating activity recently engaged in by the lines of this Conference, before they started a rate war to stop their own rate-cutting practices, are set forth in the Board's Report. For example, during October, 1952, the Conference discussed "strong rumors and indications that some member lines were not adhering to tariff rates and regulations" and formally brought the matter to the attention of the Japanese Ministry of Transportation (R. 28). The Ministry of Transportation issued a warning to each Conference line against these malpractices and the secret rebating by Conference members (R. 28).[9]

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[9] "The illegal rebating activities of this Conference have been traditional." In 1940, the United States Maritime Commission, the Board's predecessor, found that the members of the Japan-Atlantic and Gulf-Freight Conference (10 at that time, 9 foreign and 1 American) were "shown upon the record" to allow "persons to obtain transportation for property at less than the regular rates and charges currently established and enforced by means of *false billing*, in violation of section 16 "Second" of the Shipping Act, 1916, as amended; to give undue and unreasonable preference to particular persons and to subject particular persons to undue and unreasonable prejudice, in violation of section 16 "First" of that act, as amended; and to charge and collect rates and charges which are unjustly discriminatory between shippers, in violation of section 17 of that act, as amended." *Rates from Japan to the United States*, 2 U.S.M.C. 426; 437 (1940).

C. Proceedings Before the Board.

As previously stated, the facts for purposes of judicial review have been stipulated as those "existing in the administrative record as found by the Board itself" (R. 229-234). The Statements of the Case, appearing in the Board and Conference Briefs, however, especially the Brief of the Board, are so distorted, being not only outside the record but being also not within the proper scope of official or judicial notice, that Isbrandtsen feels compelled to present its own Statement in greater detail than it would normally desire.

1. *Procedural Steps Before the Board*

The present action stems from the filing by the Conference, on December 24, 1952, under Rule 236.3 of the Board's General Order 76 [46 C.F.R. 236.3], whereby the Conference proposed to employ, beginning on the 30th day following said filing, the exclusive-patronage system in the Conference trade (R. 153). Protests against the use of the system were timely filed by the United States Department of Justice and by Isbrandtsen, and said protests requested that a formal hearing be held before the issuance of any order that the system could go into effect (R. 20). By its Order of January 21, 1953, the Board refused to stay the institution of the system by the Conference pending a hearing and stated that it would grant only a post mortem hearing on the protests *after* the system would have gone into effect (R. 21; 214). Isbrandtsen filed a Petition to Review the Board's Order in the Court of Appeals for the District of Columbia Circuit, on January 22, 1953, and, on the same day, the Court granted

Isbrandtsen's accompanying application for a temporary stay of said Order (R. 21). Before the Court of Appeals, the Board argued that the agreement between conference carriers to use the monopolistic exclusive-patronage system was not an "agreement" under section 15 of the Shipping Act and could be employed by conferences without Board approval. The Court of Appeals quickly dismissed this fantastic argument, and, on March 23, 1953, it granted an interlocutory injunction against that part of the Board's Order which would have allowed the exclusive-patronage system to become effective *Isbrandtsen Company, Inc.* v. *United States*, 211 F. 2d 51 (1954). Petitions for Certiorari filed by the Conference and the Board were denied by this Court. *Japan Atlantic and Gulf Freight Conference, et al.* v. *United States*, 347 U. S. 990 (1954).

At lengthy hearings before the Board's Examiner, during the period between October 5 and December 23, 1953, the Departments of Justice and Agrienlture and Isbrandtsen appeared in opposition to the proposed system. The original Recommended Decision of the Examiner was dated September 13, 1954 (R. 22); this decision comprised less than 23 pages and contained not a single reference nor any ruling upon the 413 Proposed Findings of Fact or 43 Conclusions submitted by the Parties.[10] On the motions of Isbrandtsen, the Department of Justice, and the Board's own Public

[10] Neither the Board nor Conference Brief mentions the fact that there were two Examiner's Reports in this case, for they are both apparently quite anxious to forget this administrative interlude. The Board Brief merely states at pages 5 and 6 that, "Exceptions to the Examiner's *recommended decision* (sic.) and replies thereto were filed and oral argument was heard by the Board."

Counsel, the proceeding was remanded to the Examiner by the Board's Order dated October 6, 1954,

> "with instructions to prepare supplemental findings of fact as to the *basis for the spread* between contract and non-contract rates and as to the reasonableness of the exclusive patronage contract proposed for use in the trade, and with instructions to show the ruling upon the findings of fact and conclusions of law proposed by the parties." (R. 22).

In his Supplemental Findings, in response to the above directions of the Board, the Examiner categorically answered that,

> "*No basis for the spread or differential exists beyond the declarations of the Conference or its officers.*"

The Board itself, however, in *Contract Rates—North Atlantic Continental Freight Conference*, 4 F.M.B. 355, 371 (1954) had stated that:

> "Of course, the validity of the differential between contract and non contract rates cannot depend upon the mere declaration of its proponents. . . ." [11]

[11] This case is merely one in a long line of conflicting and inconsistent administrative decisions by the Board and its predecessors. The only consistency has been that since the case of *Rawleigh v. Stoompvaart*, 1 U.S.S.B. 285, in 1933, the maritime agencies have started with the preconceived notion that the system was legal *per se;* there has been no consistency, however, on the grounds for sustaining such legality, and principles announced in one case have seldom been followed in the next. No mention is made of the *North Atlantic* cases in the Conference brief, and the Board has only a passing and innocuous reference to it on page 73 of its Brief.

2. *The Board's Report*

Notwithstanding the deficiency of the administrative record (See Section 7 of Administrative Procedure Act, 5 U.S.C. 1009), the Board's Report, dated December 12, 1955 and served on December 14, 1955, purported to authorize the institution of an exclusive-patronage system by the Conference, effective as of January 1, 1956, whereunder the Conference would maintain two levels of rates, *viz.*, the "contract rates" and the higher "non-contract rates", the sole consideration for the enjoyment by a shipper of the lower contract rates being the agreement of the shipper to patronize the Conference lines exclusively, and to "boycott" all non-conference carriers, contract carriers as well as common carriers, as found by the Court below (R. 246, 247), the sole rea[illegible]ns for the exaction of the higher non-contract rates being the refusal of the non-contract shippers to sign such exclusive-patronage contracts with the Conference or its lines, or the action of a shipper in patronizing a non-conference line. The agreement with the shipper is signed by the Conference by its Secretary (R. 206). Irrespective of any formal deficiencies in the Board's Report, to sustain the system on its own announced theories, such Board approval of this, or any other, exclusive-patronage system was contrary to the specific provisions of Sections 14, 15, 16, and 17 of the *Shipping Act, 1916, as amended,* 46 U.S.C. §§ 812, 814, 815, 816 (hereinafter "the Shipping Act") prohibiting, among other things, "deferred rebates," "retaliatory," "discriminatory," "prejudicial," or "unfair practices," and other practices "detrimental to the Commerce of the United States."

In adopting the 9½ per cent differential between contract and non-contract rates, the Conference had no cargo statistics or surveys which it considered (R. 33). The non-contract rates were arbitrarily fixed at a level 9½ per cent higher than the contract rates (R. 20), although the Conference had not determined what rates it would establish under the exclusive-patronage system, and, therefore, the Board had no specific rates before it, in approving the system. Both the contract rates and the non-contract rates were to be charged *for precisely the same transportation service and all incidents of carriage, there being no difference in cost or value, or volume, or handling or in any other respect, between the service offered contract shippers and that offered non-contract shippers for identical cargo movements between the same ports and even on the same ship* (R. 35).[12]

In order further to coerce the shippers and to effectuate a complete and permanent monopoly in the trade, the exclusive-patronage contract, as "approved" by the Board, provided that in the event a contract shipper should patronize a non-conference vessel operating in the trade, the shipper would become liable to a penalty of 50 per cent of the freight which he would have paid at conference contract rates had the shipment moved on a Conference line (R. 36), which unconscionable fine he would be compelled to pay or lose his right

[12] The Board expressly found that:

"There would, under the dual rate system, be no difference in cost or value of service rendered to two shippers, one of which is a contract signatory and the other of which is not a contract signatory, although the cargoes of each might be identical and identically destined." (R. 35).

to the lower contract rates, and if he should violate his contract twice within one year, it would be cancelled, with the result he would have to pay the higher non-contract rates until he paid all his fines (R. 204).[13].

It should be noted that the 50 per cent penalty could not be based on any actual out-of-pocket loss to any Conference carrier. Furthermore, the Agreement between the Shipper and the Conference Carriers, strangely, provides that the penalty exacted will be paid "*to the carriers*" (R. 186), without specifying which particular Conference carrier might have been deprived of the shipper's patronage. There might not even have been any Conference line sailing on the particular day on which the shipper transported his cargo on an Independent line. If the penalty money is to be divided among *all* the Conference *lines*, part of it might be paid to several lines which would not, and could not, carry the particular cargo, because they either return from the Far East in ballast or do not serve the area or ports to which the shipper's cargo might be destined (R. 26). It is even more difficult to conceive, on what possible principle of recoupment of damages, the so-called "voluntary association", the Conference, could, itself, retain the penalty money. Such is another example of the many anomalies and legal deficiencies of this system.

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[13] It is important to note that whereas conference agreements authorized by Section 15 of the Shipping Act, 46 U.S.C. sec. 814, may contemplate elimination of competition *only among* member lines of the particular Conference, the principal purpose of the exclusive-patronage system is to eliminate and perpetually to suppress *non-conference or independent* carriers. This predatory purpose has been frankly admitted by representatives of the Board. See *infra*, page 78

The exclusive-patronage contract, moreover, would be entered into for an indefinite period of time—forever, except that it would be subject to cancellation upon *three months'* notice, a period sufficiently long to restrict the shipper's freedom of choice and possibly put him out of business. (R. 35). This entire system is intended to crush and eliminate the independent competition of Isbrandtsen, thereby allowing the Conference to enjoy a complete and perpetual monopoly in the trade and to charge such rates as the Conference lines may wish. The Board found (R. 30) that "Shippers testified to a lack of success . . . in their efforts to convince the Conference to reduce the level of rates on various commodities."

The economic coercion of the Conference is further aided by the fact that the Conference lines collectively furnish over 300 sailings a year as compared with only 26 sailings yearly (an approximately fortnightly service) by Isbrandtsen (R. 27). Many shippers in the trade require more than two sailings each month (R. 35). Various Conference lines also furnish certain special facilities, such as refrigerated space and silk rooms, which Isbrandtsen does not provide (R. 35).[14]

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[14] The exclusive-patronage contract obligates the shipper to ship, on Conference vessels "all shipments made directly or indirectly by him" (R. 203). The inference in the Board Brief, page 73, that, "commodities which are not carried by non-conference competitors cannot be included," is not correct. Even if no dual rates were established for refrigerated cargo, for example, the shipper would still be precluded by the present provisions of the exclusive-patronage contract from using a non-conference carrier for such cargo without incurring the penalties in the contract. In any event, the some 57 conferences which use the System and have no independent competition, must "include commodities which are not carried by

Furthermore, Isbrandtsen does not serve certain ports, such as Gulf and other ports, which the Conference lines serve (R. 35). Shippers who would have to rely on Conference vessels even for part of their service would be economically coerced into signing exclusive-patronage contracts with the Conference and would be prevented from patronizing or using the service of Isbrandtsen.[15]

The Brief of the Board implies at page 50 that the Conference would undertake an obligation to provide certain shipping space to contract shippers.[16] Any

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non-conference competitors," because there are no such competitors in existence.

[15] The Board in its Report admits the tremendous economic coercion which would be enjoyed by the Conference (R. 35):

> "Isbrandtsen's' carryings, if a dual rate system were put into effect in this trade, would be limited by the lack of reefer space and special silkrooms on Isbrandtsen vessels and by the limited frequency and range of service of those vessels. Shippers of dry cargo destined for Gulf ports, shippers of reefer cargo, and shippers requiring more than two sailings per month would practically, *have no choice* between the Conference and Isbrandtsen's service as presently constituted."

Such is the fertile field of monopolies generally.

[16] There is also an indication on page 50 of the Board Brief that the contract shipper can escape the penalties under the exclusive-patronage contract and ship via a non conference carrier if the Conference vessels should be unable to provide space for his cargo. Any such privilege in the contract is more apparent than real. It assumes that there will be a non-conference carrier able to carry his cargo which will not be the case if the system is effective, as witnessed by the some 57 Conferences using the system where there is *no* real independent operator. Under this particular exclusive-patronage contract, however, if the Conference carriers do not provide space, the shipper can secure space elsewhere *only after notifying* the Secretary of the Conference *and provided* that:

> "the Secretary does not notify him within three (3) days thereafter, excluding Sundays and holidays, of the availability of

such inference is false, as is apparent from the exclusive-patronage contract the shipper would be forced to sign (R. 203-206). The consideration is all on the side of the shipper. The Conference Brief, on page 3, frankly admits this illusory aspect of the exclusive-patronage contract stating that

> ". . . the Petitioners operate their vessels for their own account and profit; conduct their own business in such manner as their respective managerial judgments may determine; build such ships to be used in the trade as they may think appropriate; *have as many or as few sailings as they may deem best*; . . ."

The Board specifically found that most of the Conference vessels commence loading inbound cargo for the United States at the Philippines, proceed then to Hong Kong and complete loading in Japan, and that they discharge such cargo at Pacific, Gulf, and Atlantic ports of the United States (R. 25). The principal inbound cargo of Isbrandtsen has been loaded at Japan and the Philippines (R. 26). From 1950 to the present, Isbrandtsen has offered an approximately fortnightly service from Japan and the Philippines to Pacific and

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space on Carriers' vessels within the ensuing *fifteen* (15) *day* period."

Assuming a not unusual occurrence of an intervening Japanese or American holiday, the shipper might be required to wait nineteen (19) or twenty (20) days after notifying the Secretary, before he could obtain space on a Conference line. It is undisputed that many shippers in this trade need more than two sailings per month (R. 35). This 20 day delay would damage even a shipper who regularly requires only two sailings a month.

Atlantic Coast ports of the United States (R. 27). The Conference lines collectively during the year 1953 offered approximately 300 sailings from Japan and approximately 250 sailings from the Philippines, as against Isbrandtsen's 24 sailings in each instance. R. 27).[17]

The sailings and percentage carryings of the Conference vessels in the trade from Japan have increased substantially each year since 1950 without the use of the exclusive-patronage system. Both the Board and the Conference emphasize, in their Briefs, the relative participation between Conference vessels and the vessels of Isbrandtsen in the carriage of *Japanese* cargo, attempting to offer the implication that Isbrandtsen was carrying large percentages of this cargo movement in comparison with the Conference members (Bd. Br., p. 7; Conf. Br., p. 8).[18] The conclusion proffered by

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[17] The administrative record includes sailings for only the first half of 1953. Conference sailings for the full year 1953 are estimated on the basis of figures for the first six months of the year, during which the Conference had 153 sailings from Japan and 127 sailings from the Philippines, and Isbrandtsen had 12 in each instance.

[18] The Board, at page 7 of its Brief, states that the increased participation of Isbrandtsen in the carriage of cargo from Japan was "most probably at the expense of the non-Japanese Conference lines which did not enjoy as an offsetting factor the nationalistic preference of Japanese shippers (R. 61)." Just what the relevancy of this curious statement may be to the Board's argument is unknown to us, but in any event Isbrandtsen is a United States-flag carrier, which the Board has the primary duty to protect even under its regulatory statutes [See section 1 of the Merchant Marine Act, 1920, as amended, 46 U. S. C. 861]. There is no category of "non-Japanese Conference lines" set forth in any of the Shipping Acts as deserving of any similar protection by the Board.

the Board and the Conference is most patently illusory. The trade from the Philippines and Japan to the Gulf and the Atlantic Coast of the United States is actually one trade participated in by all carriers, as the Board's Report finds (R. 25, 26). All of the members of the Japan-Atlantic and Gulf Freight Conference [except States Marine which returns inbound in ballast (R. 26)] belong to the Associated Steamship Lines (Manila Conference), which covers the trade from the Philippines to the United States and *other ports of the World.*[19] Isbrandtsen has been virtually excluded from Philippine cargo by use of the exclusive-patronage system in that trade.

When the overall trade from the Philippines, Hong Kong and Japan is considered, *the Conference lines have carried, on the average, on each sailing, more cargo than Isbrandtsen.* For example, taking the last full year of record, 1952—long before the Conference started the Rate War—each Conference vessel carried an aver-

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[19] The Associated Steamship Lines (Manila Conference) is one of the most all inclusive and far-reaching conferences in existence, having 45 foreign-flag line members and 7 American-flag line members. This conference includes under its jurisdiction many trades not even involving the foreign commerce of the United States, yet conducted under a Conference Agreement [F.M.B. No. 5609], approved by the United States Maritime Authorities. The extraordinary scope of its coverage is described, in *Approved Steamship Conference and Related Agreements* (Federal Maritime Board, April 15, 1956), p. 53, as follows:

> "Covers freight traffic from the Philippine Islands direct to, or via ports in Ceylon, India, Pakistan, Malaya, East Indies, Indo-China, Burma, Siam, Hong Kong, China, Korea, Japan, Siberia, United States of America, Canada, Cuba, Mexico, Central America, Canal Zone, South America, Caribbean Sea Ports, West Indies, Australia and New Zealand."

age of 4700 tons per sailing from the Phillipines as against only 1007 tons carried by Isbrandtsen (R. 27), so that on arrival at the United States, every Conference vessel had, on the average, more cargo aboard than did Isbrandtsen's ships. In addition, the Conference vessels loaded cargo at Hong Kong, from which port Isbrandtsen carried no cargo (R. 27).[29] Thus the Conference vessels loaded substantial inbound cargoes, before ever calling at Japan, in trades where Isbrandtsen is virtually excluded from participation because of the use of the exclusive-patronage system. These figures show conclusively that there has been no gradual encroachment by Isbrandtsen upon the carryings of the Conference—*the situation has been, in fact, the reverse.*

The Conference argues, in footnote 4 on page 8 of its Brief, that it is "inappropriate" to combine the carryings from the Philippines and Japan in measuring the relative participation of the Conference lines and Isbrandtsen. In this respect, the Conference argues that Japanese cargoes pay a higher revenue than Philippine cargoes and are more highly coveted by the Conference. The argument is misleading. The record contains no proof of the profits or loss incurred by either Isbrandtsen or the Conference lines. There are many

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[29] Isbrandtsen has also been excluded from participation in the trade from Hong Kong to the Atlantic Coast of the United States because of the employment of the exclusive-patronage system in that trade by the New York Freight Bureau (Hong Kong) [F.M.B. Agreement No. 5700]. All of the members of the Japan-Atlantic and Gulf Freight Conference, which serve the trade from Hong Kong, also belong to that other conference, the New York Freight Bureau (Hong Kong).

instances where lower-rated bulk cargoes may afford a higher return to the carrier than higher-paying general cargo, when handling costs, port delays and other factors are considered. Also, there is no indication in the record as to whether Isbrandtsen may have carried lower-revenue cargo from Japan than have the Conference lines. The fact that is clear in the record is that Isbrandtsen would have desired to carry larger amounts of cargo from the Philippines but was precluded from doing so because of the use of the exclusive-patronage system in that trade.[21]

The Conference also argues, on page 8 of its Brief, without any reason, that this particular trade must be treated in isolation, and that it is "irrelevant" that Isbrandtsen has been excluded from other trades. Such an argument loses any sense of reality. In this connection also, the Board in its Brief repeats the meaningless finding in the Board's Report that Isbrandtsen would retain 10 per cent of the cargo in the Japan-Atlantic trade if the system should be instituted (Bd. Br., pp. 9, 31, 32). Of course, the Board could not by any such *ex cathedra* pronouncement guarantee any specific participation to Isbrandtsen, and it is contrary

[21] Many factors can account for one line's carrying a higher percentage of cargo from a particular area than another line. Some lines, for example, do not offer as extensive port coverage as other lines. In this particular trade, because of the relative scarcity of inbound cargoes, as the Board's Brief admits on page 29, some lines return to the United States in ballast. Isbrandtsen has been forced to concentrate on Japanese cargo and to offer an extensive port coverage in Japan because of its exclusion from the other inbound trades. Furthermore, the Conference lines outbound from the United States carry large volumes of profitable cargo, which accounts for the overtonnaging on the return.

to any logical analysis that such a fantasy should be presented by any agency supposedly harboring "expertise". In this respect, it may be asked: Why has Isbrandtsen failed to carry its proportionate amount of the cargo in the Philippine and Hong Kong trades where the exclusive-patronage system is now in use? The answer quite obviously is that, once shippers have been tied up under the exclusive-patronage contracts, e.g. no such theoretical prognostication of independent carrier participation can become a reality. See the discussion *infra* concernings the statements of the Chairman of the Board in the *Trans-Pacific Freight Conference of Japan*, 4 F.M.B.—(1955).

This particular Conference trade, between Japan, etc. and the Gulf and Atlantic ports, if it is to be examined at all, cannot be considered in isolation. Neither the Conference carriers nor Isbrandtsen could conceivably stay in business by carrying return Japanese cargoes alone. In the carriage of cargoes between the Far East and the United States, numerous conferences will assert jurisdiction over the cargo movements involved, all of which cargo may move on the same vessel.

For example, Kawasaki Kisen Kaisha, Ltd., a member of the Japan-Atlantic and Gulf Freight Conference, operating between the Far East and the United States, belongs to eighteen (18) steamship conferences, twelve (12) of which presently employ the exclusive-patronage system.[22] The situation of that particular Conference line is somewhat typical. If the trade is

[22] These statistics are on public file with the Board, and some are published in *Approved Steamship Conferences and Related Agreements* (F.M.B., April 15, 1956).

to be examined at all, therefore, and Isbrandtsen contends that the fundamental issue before this Court relates to a question of law, the complete facts should be viewed, not only those which the Board and Conference consider favorable.

The trade *from* Japan to the North Atlantic is presently overtonnaged, as both the Board and Conference admit (R. 27). This overtonnaging problem was made serious by the re-entry of Japanese lines into the trade, which lines carried only 15 per cent of the total cargo movement in 1951, but 66 per cent of such total movement in the first six months of 1953 (R. 28).[23] United States-flag participation, including that of Isbrandtsen, fell from 53 per cent in 1950 to only 21 per cent in the first six months of 1953 (R. 28). Instead of applauding the independent efforts of Isbrandtsen to maintain United States-flag participation in the trade, the Board seems quite insistent in snuffing out this one last vestige of American-flag independence.

As previously stated, the Conference lines have traditionally engaged in malpractices and secret rebating, and have failed to observe their own tariff rates (See footnote 9, *supra*). Such secret rebating and illegal rate cutting activities, during the pre-war years, took place when the Conference admittedly enjoyed an absolute monopoly through its illegal use of the exclusive-patronage system—due to lack of approval—and was thereby able to destroy all independent competition (R. 25). The ills which befall cargo operations in this trade are, therefore, chronic and will not be solved by

[23] The Board found that there "is a tendency on the part of Japanese shippers to favor Japanese lines. . . ." (R. 29).

the use of the predatory exclusive-patronage system, since that system will only provide for the destruction of the independent operator; it cannot cure the malpractices of Conference operators themselves, which practices are difficult if not impossible for the Board to police.

In March 1953, the Conference rejected a proposal of a member line to meet Isbrandtsen's competition by lowering the Conference tariff rates (R. 30). The Conference instead voted on March 12, 1953 (after the Court of Appeals had granted the stay referred to above, against the use of the system) to "open" rates on the ten major commodities in the trade (R. 30). Subsequently, the Conference opened rates on most commodities which move in substantial volume (R. 30). The Board found that the decision to start the rate war was directed at non-conference competition and also *at the secret "rebating" by Conference lines* (R. 31). It is frankly stated by the Board that the Conference, in starting the rate war,

> "hoped that the rate war would lead to Isbrandtsen's joining the conference or to the institution of the dual rate system or other system" (R. 31) [either of which occurrences would have given the Conference an absolute monopoly].

On page 7 of the Board's Brief, the facts concerning the Conference institution of the rate war are deliberately misstated. It is stated that the Conference opened rates on ten major commodities, on March 12, 1953, "in order to meet Isbrandtsen's competition." Even the Board's own Report had found that it was

also directed at the secret "rebating" by *Conference lines* (R. 31). It seems quite clear that Isbrandtsen was merely the scapegoat in this brazen action of the Conference.

The Board's Brief, on page 72, where it attempts to marshal the so-called "principles" which the Board's own cases have allegedly established, with respect to the exclusive-patronage system, states that

> "the dual rate system will not be approved unless there is a showing that its use will not result in a virtual monopoly by the Conference lines, *nor if the Board concludes that the dual rate system will not in itself eliminate the rate instability due basically to over-tonnaging and malpractices such as secret rebates by member lines.*"

As authority for this most recent attempt at palliation, the Board's Brief cites *Trans-Pacific Freight Conference of Japan*, 4 F. M. B. — (1955). The Trans-Pacific Freight Conference of Japan [F. M. B. Agreement No. 150], is nothing more than the companion conference of the Japan-Atlantic and Gulf Freight Conference. The Board's Report admits that the two conferences "have taken *identical actions* at similar times, that the conferences meet at the *same address*, and that the membership for the greater part is *common*." Fifteen of the seventeen members of the Japan-Atlantic and Gulf Freight Conference (all except Waterman Steamship Corporation and Lykes Bros. Steamship Corporation, two United States-flag carriers) also belong to the Trans-Pacific Freight Conference of Japan. The two conferences have traditionally

acted together on rate matters and prior to the Second World War at least published a joint tariff. *Rates from Japan to the United States, supra.* It is extraordinary, therefore, under these circumstances that the Board should cite the *Trans-Pacific* case for the above-announced proposition. The "secret rebating" referred to in that case involved secret rebating by the same lines referred to in the instant case. The Japanese Ministry of Transportation issued joint warnings to the members of each conference concerning these illegal activities. Moreover, the decision of the Japan-Atlantic and Gulf Freight Conference to start the rate war on March 12, 1953 was taken "in view of the action taken previously [by virtually the same lines] by the Trans-Pacific Freight Conference of Japan" (R. 31).

Immediately after the outbreak of the rate war, rates fell to less than out-of-pocket handling costs (R. 31). In May 1953, Isbrandtsen instituted minimum compensatory rates below which it would not go to secure cargo (R. 31). *Isbrandtsen gave public notice in the trade of its desire to apply reasonable rates, which practice the Conference lines refused to adopt.*

3. *The Board's Inaction during the Rate War*

The Board in its Report has found that the rate war, instituted by the Conference, has been severely detrimental to the Commerce of the United States, and that it had resulted in United States-flag lines, including Isbrandtsen, carrying little or no cargo in the trade—at least up to the time of the hearing (R. 32). Many shippers requested the Conference to end its deleterious practice (R. 32). So did Isbrandtsen!

The Board's Brief intimates in various instances that the Board has plenary power over the rate practices of Conference lines, although not over those of the independent (Bd. Br. pp. 31, 32). Certainly, the Board's own inaction for over four years, while the Conference carried on its pernicious rate war, negates any claim at this time by the Board that it will hereafter protect the public interest. The rate-war conditions were called to the Board's attention formally on several occasions and were commented upon publicly by the Board Members, and repeatedly in the press of this country and Japan. Despite the deleterious results which followed from the Conference's display of power, in defiance to the Court of Appeals below, for granting, on January 23, 1953, an injunction against the use of the system, the Board has not lifted one finger to halt this Rate War, from March 12, 1953, to the present. The Board, in its Report, admits that it had, at all times, the power, and, indeed, the statutory sanction to end the rate war by methods short of establishing and promoting a monopoly of foreign-flag carrier, for it states that:

> "In any event this Board has full power over those rates of conference carriers in foreign commerce which are detrimental to the commerce of the United States" (R. 65).

The opinion of the Court in *California* v. *United States*, 320 U.S. 577 (1944), by Mr. Justice Frankfurter, concurs in this analysis by the Board of its own powers, as follows:

> "Finding a wrong which it is duty-bound to remedy, the Maritime Commission, as the expert body

> established by Congress for safeguarding this specialized aspect of the national interest, may, within the general framework of the Shipping Act, fashion the tools for so doing. Cf. *United States Nav. Co.* v. *Cunard S. S. Co.* 284 U.S. 474" and other cases. [320 U.S. 577 at 584]

Various opinions of the Board's predecessor agencies have recognized these inherent powers of the Maritime Agency administering the Shipping Act to condemn rate practices of conference lines which are found to be detrimental to the commerce of the United States. *Edmond Weil* v. *Italian Line*, 1 U.S.M.C. 395 (1935); *Pacific Coast-River Plate Brazil Rates*, 2 U.S.M.C. 28 (1939); *Pacific Forest Industries* v. *Blue Star Lines, Ltd.*, 2 U.S.M.C. 54 (1939); *Cargo to Adriatic, Black Sea, and Levant Ports*, 2 U.S.M.C. 342 (1940).

4. "*Public Interest.*"

The Brief of the Board injects into this proceeding an unfounded argument concerning "public interest." We ask at the outset, what "public interest" are they talking about—that of this Country or of other countries? In this connection, the Board's Brief refers to "general support" given to the system by shippers (Bd. Br., p. 8), and it also refers to an alleged but fanciful protection which would be given to American-flag carriers by use of the system (Bd. Br., p. 30).[24] Such arguments have little foundation in fact, let alone any persuasive force on the legal issue of the lawful-

[24] The Brief of the Conference contains similar arguments (Conf. Br. p. 11).

ness of the System. Whether shippers join the system, or oppose it, can in the last analysis have no weight in the consideration of the issue of legality here posed. In any event, however, neither the Board nor the Conference has established any right to speak for the shipping public in this respect.[25]

The Board has been traditionally interested in espousing the interests of the steamship conferences. Even the Board's Report, however, was forced to recognize

[25] The Board has consistently given short shrift to the other side of the picture, namely, any objections of shippers opposing the use of the system. It has paid little attention to the opposition of the Secretary of Agriculture of the United States, the largest shipper in the World, who has consistently opposed the exclusive-patronage system, and who is a Respondent in this very case. The various farm organizations of the United States, representing hundreds of thousands of American shippers, the American Farm Bureau Federation, the National Council of Farm Cooperatives, the National Grange, the Farmers' Union, and the United Fresh Fruit and Vegetable Association, have opposed the system and testified against it before the Board, yet their testimony was scarcely mentioned in the Board's Report. *Secretary of Agriculture* v. *N. Atlantic Continental Freight Conf.*, 4 F.M.B. — (1956). The latter case is now pending appeal from the Board's decision, approving the use of the system in that trade upon the Petition to Review filed by the Secretary of Agriculture with the Court of Appeals for the District of Columbia Circuit. As far as shipper opposition is concerned, the Board's Brief (p. 73) correctly states the fact that, "The *support* of shippers interested in the trade has been given weight." It cites for this proposition the North Atlantic Conference case; it should have added that, "the opposition of shippers interested in the trade *has been given no weight.*"

Certainly also, the Board does not speak for the many shippers who have been coerced into signing exclusive-patronage contracts against their wills, nor those American shippers who have been sued by the conferences in an effort to recover the unconscionable penalties imposed by such contracts. See *Pacific Westbound Conference* v. *Leval*, 269 F. 2d 541 (1954); *River Plate and Brazil Conferences* v. *Pressed Steel Car Company*, 222 F. 2d 369 (1955).

that the shipper witnesses, appearing at the administrative proceeding, gave no unqualified endorsement to the exclusive-patronage system (R. 33, 34). At least one shipper witness—appearing on behalf of the Conference—expressed his dissatisfaction with the differential between contract and non-contract rates (R. 33). The Board also reported (R. 34) that

> "Another shipper withdrew his opposition contingent upon the premise of better future cooperation by the conference in negotiating freight rates with shippers and in discussing terms and conditions of the dual rate contracts."

Furthermore, neither the Board nor the Conference mentions that the only shipper witnesses to appear at the hearing were those of the Conference, mostly Japanese shippers (R. 32), imported from Japan by the Conference to testify at the proceeding.[26]

The Board and the Conference attempt to hinge a considerable part of their factual argument on the fact that Isbrandtsen had, prior to the Conference rate war,

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[26] The lack of shipper testimony in opposition to the powerful Conference Monopoly is not surprising. Few shippers can enjoy the freedom of the Secretary of Agriculture or the farm organizations. In the most recent book on the Conference Monopolies, *International Shipping Cartels*, (1953) by Daniel Marx, Jr., who himself has appeared as a paid witness of the conference in support of the system [See *Trans-Pacific Freight Conference of Japan*, 4 F.M.B. — (1955)], reference is made at page 51 that the Alexander Committee (Vol. 4, pp. 5, 59) had noted that very few shippers were willing to testify, fearing retaliation, and that the Report of the English "Royal Commission on Shipping Rings" had previously found the same situation to exist, *viz.*, that shippers, in fear of reprisals, were afraid and unwilling to testify—that is, against the conferences.

charged rates below those appearing in the Conference tariff. There was every justification for Isbrandtsen's rate practices. First, there has never been any question but that Isbrandtsen always charged compensatory rates; secondly, various Conference carriers themselves were charging rates below those appearing in the Conference tariff through the device of secret rebating; and, thirdly, even the Conference's own shipper witnesses complained that prior to the rate war the Conference rates were too high. On the latter point, the Board found that:

> "Various shippers have considered the general level of conference rates to have been too high, prior to March 12, 1953" (R. 30).

The Board found further on the same page that:

> "Additionally, shippers testified to a lack of success until subsequent to March, 1953, in their efforts to convince the conference to reduce the level of rates on various commodities" (R. 30).

Under these circumstances, it certainly was most proper, and indeed necessary—because the Conference lines were rate-cutting among themselves—for Isbrandtsen to charge rates below those appearing in the Conference tariff. Neither the Board nor the Conference are so brazen as to assert that Isbrandtsen, as an independent carrier, should have been bound by the Conference tariff. Strangely enough, the Board finds at the end of its Report that

> ". . . the continued existence of Isbrandtsen as an effective competitor and the existence of strong

shipper groups insures conference consideration of shipper needs and desires" (R. 68).

This assumes that, if Isbrandtsen could continue, it would have to charge rates *at a lower level* than the rates of the Conference.

It should be noted here that the Board's Report itself assumes that the independent carrier, confronted with competing against a Conference using the exclusive-patronage system, *would necessarily have to charge rates below the Conference tariff in order to get any cargo.* The Board, in this respect, recognizes in its Report that Isbrandtsen would have to give rate "inducements" in order to get any share of the cargo from the Conference (R. 62). The Board's Report also alludes to certain mythical shippers who *might not* sign an exclusive-patronage contract, and, thereafter, ship one-half of their shipments by Conference carriers at the non-contract rates and one half at the *lower* rates of an independent (R. 33). Such an argument is not only specious, but obnoxious to all American statutes designed to preserve free business enterprise and to prevent monopolistic coercion. On what theory can the Board pass on to the Conference the power to force the non-conference carrier into the impossible situation of being able to exist only if his rates are always maintained at levels at least 9½ per cent below the Conference contract rates?

The Board's argument is fraught with so many inconsistencies and illogical absurdities that it is impossible to discuss them all. Not the least of such absurdities, however, is the fact that the Board would approve,

and apparently consider, as reasonable, the Conference non-contract rates, which are 9½ per cent *higher* than the Conference contract rates, and, at the same time, consider that a level of rates 9½ per cent *below* these Conference rates would be reasonable for the independent carrier. As a matter of mathematics, *the Conference non-contract rates would always be twenty-one (21) per cent higher than the rates which the independent would have to charge on the Board's theory.* For example, if the Conference contract rate on a particular commodity were $80 per ton, the Conference non-contract rates, being 9½ per cent higher, would be $87.60 per ton. The independent, in order to meet the Conference differential between contract and non-contract rates, according to the theory of the Board, would have to charge a rate of $72.40 per ton. The difference between the Conference non-contract rate and the rate of the independent would be $15.20, or the Conference non-contract rate, therefore, would be twenty-one (21) per cent higher than the rate of the independent.

Even in theory, the Board's formulation of the effect which the exclusive-patronage system would have on the independent cannot be defended. In this respect, the Board's Report recognizes that no one could identify any hypothetical shippers who would, or could, split their shipments 50-50 between the independent carrier and the Conference lines and still come out even in total freight payments (R. 33),[27] all of this assuming,

[27] The matter of splitting shipments in this way, of course, would not be as simple as the Board assumes. Shippers in this trade, as in others, will ordinarily ship many different commodities taking

of course, that the Independent carrier would and could charge rates always at least 9½ per cent below the Conference contract rates. As a practical matter, *it is probable that all shippers would be forced to sign up,* and as a practical matter also, Isbrandtsen could probably not afford to charge rates 9½ per cent *below* the Conference contracts rates on *all* commodities. Isbrandtsen's rates are fixed in order to be compensatory, and, at least during the period since March 12, 1953, it has charged rates higher than those of the Conference lines (R. 31). When the Conference ties the shipper to the exclusive-patronage contract, it is not in relation even to the existence of an independent carrier, much less is it premised on any foundation in fact that an existing non-Conference carrier does charge rates lower than the Conference rates. The prime objective of the Conference's system is to tie up all shippers, even though independents might charge rates *higher* than Conference rates.

If the Board undertook a realistic application of some of the "principles" it has announced in its own decisions, *but has never applied,* it would have long since prohibited all conferences from using the system. For example, in *Contract Rates—North Atlantic Freight Continental Freight Conf.*, 4 F.M.B. 355 (1954), *a case now ignored by the Board and Conference,* the Board stated that:

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different ocean transportation rates, which rates may change during the course of a year. The shipper will, moreover, not know the exact quantities that he will ship during the course of a year and will have no way of planning such split shipments even if such an unrealistic practice were otherwise assumed to be practicable."

> "The inducement to a shipper becomes coercive upon him if it unduly forces his original choice, or places unreasonable restrictions upon his subsequent freedom to choose any carrier that he may later prefer."

Should we consider the Board's assumption in its Report in the instant case to be true, which certainly has not been proven, that Isbrandtsen could exist in the trade after the sytem were instituted, by charging rates 9½ per cent. below the Conference contract rates, all that the Conference would have to do to drive Isbrandtsen out of business once and for all would be to lower its contract rates temporarily to a level which Isbrandtsen, as a United States-flag carrier, could not underquote, and, of course, when Isbrandtsen disappeared, the Conference would be free, as any monopoly would, to raise its rates without limit—to charge "what the traffic would bear", as Conference witnesses have usually put it. Certainly the Board, which has never exerted any real control or supervision over the *level* of Conference rates, could not be relied upon to stop such a result, and, in any event, the subtleties involved in such a Conference freeze-out program would make it virtually impossible to police. The Board, of course, has done nothing to control Conference rate practices during the four-year period of the Rate War, and they have failed to disapprove, in their Report, or otherwise, even the prima facie exorbitant rates that the Conference would charge to *non-contract shippers*.[28]

[28] It is no answer to the Board's inaction during the rate-war period that the Conference had "opened" rates and were no longer

Connected to this over-all problem is the fact that this exclusive-patronage system would cover *all* commodities. Many large shippers ship a great number of different commodities. If the shipper, signing an exclusive-patronage contract, should thereafter become dissatisfied with an unreasonably high Conference rate increase on one commodity, for example, it would *not* be possible for him to use an independent, to carry that commodity, *even if such a carrier were available*, because such action would require the shipper to cancel or violate his contract for *all* other commodities, for which he might not be able to get sufficient service from the independent carrier. He could not, therefore, readily take advantage of any lower rate which the independent might offer on that particular commodity, without thereby becoming subject to the higher-penalty non-contract rate for the carriage of *all* of his commodities on the Conference lines, or without incurring the unconscionable penalties provided for in the exclusive-patronage contract. This is the coercion which, after forcing him to sign the exclusive contract, keeps him bound to it, in perpetuity. It should be borne in mind also, that the shipper is required to give three months' notice of cancellation. The tremendous economic coer-

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acting as a Conference with respect to such rates. Conference action *was taken* in the opening of the rates, and the Conference *did continue to operate as a Conference*, under its basic agreement, approved by the Board, *during the entire period of the Rate War*. If Board jurisdiction could be avoided merely by the device of opening rates, then the professed power of the Board to stop Conference rate practices detrimental to the commerce of the United States would be meaningless. All that a Conference would have to do to escape the Board's power would be to open rates and thereafter act with impunity, as well as with immunity.

cion against the shipper is, therefore, insidious and complete. The Board's observation that, "the *continued existence of Isbrandtsen* as an effective competitor . . . insures conference consideration of shipper needs and desires" is an assumption taken out of thin air. Neither Isbrandtsen, nor any other independent carrier, could continue as an "effective competitor" in the trade when confronted with the tremendous coercive effect of the exclusive-patronage system, which has so many powerful and sometimes subtle aspects of coercion.

It would hardly appear to be consonant with the interests of the shipping public to promote a complete monopoly for the fixing of steamship rates. The Board's Brief, however, under the heading "The Insistent Economics of Ocean Shipping", *a section filled with allegedly general but unfounded concoctions*, advances the astonishing argument that the effectuation of the Conference Monopolies, by use of the exclusive-patronage system, is necessary to protect the higher-cost United States-flag operator (Bd. Br., pp. 28-29). (Isbrandtsen, it must be pointed out, is such a "higher-cost" United States-flag operator.) *The Board, in other words, proceeds upon the assumption that Conferences fix rates so as to allow a profit to the highest-cost operator in the trade.* It should be noted that the facts alleged in these arguments by Board's Counsel were not presented at the administrative hearing, and that the alleged facts involved are not so free from contention as to be within the scope of official or judicial notice. More importantly, however, the arguments are logically as well as legally absurd on their face.

The Federal Maritime Board is empowered and indeed directed to grant construction and operating-differential subsidies to United States-flag carriers under Titles V and VI of the Merchant Marine Act, 1936, as amended, 46 U.S.C. sec. 1151, *et seq.* The purpose of these subsidies is to place the United States-flag carrier *on a parity* with respect to operating and construction costs with his foreign-flag competitors. No similar policy of subsidy is announced in the Shipping Act of 1916, which is primarily a regulatory act, similar to the Interstate Commerce Act, 49 U.S.C. sec. 1, *et seq.* If the subsidy program places the United States-flag carrier in a position of parity with respect to foreign costs, why should the American shipping public—importer, exporter and consumer—be required to pay a further subsidy, by way of rates fixed by foreign-dominated conferences, to allow a profit to the high-cost American-flag carrier on top of the subsidy? The suggestion is preposterous—the only real beneficiaries of such an astounding program would be the much lower-cost, foreign-flag carriers, which thereby would receive windfall profits, and American exporters, importers and consumers would be the involuntary donors. The exporter, importer or consumer in Iowa, for example, who never saw an ocean, let alone a big ship, would be assessed not only for the subsidies paid out of the United States Treasury, but also for the bonuses to the low-cost foreign operators. Considering the overwhelming membership of the foreign-flag lines in these conferences, it becomes readily apparent that, when rates are fixed sufficiently high to allow the higher-cost United States-flag carrier a profit above subsidy, the lower-cost

foreign-flag lines are benefiting in some cases by a ratio of 23 to 1. In other words to protect one American-flag line, American exporters, importers, and consumers must pay exorbitant and unreasonable rates to all of the foreign-flag lines.

The position of foreign-flag carriers in such monopolistic conference arrangements is obvious. Their interests, of course, are quite real and selfish, but they do not constitute the "public interests" of *this country*. There are some 125 Steamship Freight Conferences on file with the Board, organized pursuant to agreements under section 15 of the Shipping Act. See *Approved Steamship Conference and Related Agreements* (F.M.B., April 15, 1956). As previously stated, and as admitted in the Board's Brief (Bd. Br., p. 18), 62 of these conferences presently employ the exclusive-patronage system. Only 7 of these conferences, now using the system, however, have any independent competition whatsoever, as admitted in the Affidavit of Lloyd Tibbott, Chief of the Board's Office of Regulation, filed with the Court below (R. 133-136). Even the non-conference competition which is alleged to exist is exceeding minimal, amounting for the most part to the independent competition of Isbrandtsen—the single non-conference line in 3 of those 6 trades—and Isbrandtsen's operations in those trades is virtually non-existent.

For example, Isbrandtsen is listed as the only independent competitor in the "Atlantic-Far East" trade (R. 136) in competition with the Far East Conference (F.M.B. Agreement No. 17), but in that trade Isbrandtsen operates to the Far East via the Suez Canal, on its

Eastbound Round-the-World Service, and is not competitive ordinarily with the vessels of the Conference which take the substantially shorter and more direct route via the Panama Canal. Isbrandtsen, as a consequence, has carried very little cargo in this trade. Similarly, in the trade of the Pacific Coast European Conference (F.M.B. Agreement No. 5200), where Isbrandtsen is listed (R. 136) as the sole independent competitor, the Board found in *Agreement and Practices Pertaining to Brokerage Pacific Coast European Conference*, (decided March 29, 1957) (Mimeographed Opinion, page 10), that Isbrandtsen's "competition is relatively minor." Again, in another one of these conferences where Isbrandtsen is listed as the sole independent line, (R. 135), the "Atlantic-Malay States" trade (F.M.B. Agreement No. 8240), virtually the entire cargo movement and the vessels of the Conference proceed outbound through the Panama Canal; Isbrandtsen could carry very little cargo outbound over the much longer route through the Suez Canal.

In the remaining three conference trades listed (R. 135-136) as "having independent competition", the "Gulf & South Atlantic Continental Europe" trade (F. M.B. Agreement No. 134) shows three foreign lines as independent competitors of the Conference (R. 135). The "North Atlantic-Mediterranean" trade (F.M.B. Agreement No. 7980) lists Isbrandtsen and four foreign lines as independent competitors (R. 135), and the "Atlantic & Gulf/West Coast of South America" trade (F.M.B. Agreement No. 2744) lists only one independent, a foreign line (R. 136).

It should be noted that the largest American-flag

member of the Japan-Atlantic Conference (not carrying the largest amount of cargo in this particular trade, however), the heavily subsidized American President Lines, whose chief Counsel appears as "Special Counsel" on the Board's Brief, and who will argue the case for the Board before this Court, belongs to a total of 43 conferences, of which only sixteen (16) conferences use the exclusive-patronage system. Of those sixteen (16) conferences, however, which use the system, only two (2) have any independent competition (F.M.B. Agreement No. 8240, from the Atlantic to the Malay States, and FMB Agreement No. 17, from the Atlantic and Gulf to the Far East). In neither of those conference trades, which proceed through the Panama Canal, is Isbrandtsen, which is the alleged competitor (R. 135-136) really in competition with American President Lines, because Isbrandtsen takes the longer route through the Suez Canal.

So where is the independent competition, presently existing, to justify one of the "standards"—*viz.*, "independent competition"—fabricated by the Board as a justification for the use of the system (Bd. Br., p. 72)? Where there is no independent competition, of course there could be no "instability of rates" or "instability of service" caused by a non-conference line.

Even under the Board's own criteria, nothing is left as a justification for the use of the system. The system is completely antagonistic to American political and economic philosophy and is not indigenous to this country, being merely a reversion to the "old-world" cartel idea of letting any and all conferences use the system solely as a "weapon" against or a "deterrent"

to any independent daring to intrude into the trade *in the future*—a situation which the Board and Conferences have dubbed "potential competition".

In a recent oral argument before the Board, on September 17, 1957, in *Statement of the Great Lakes—Bordeaux/Hamburg Range Westbound Conference* (Docket 795), the Board's Public Counsel, Mr. Schmeltzer, stated correctly, in response to a question from the Board's Chairman, as follows:

> "But you cannot get around the law and say that at some time or other there may be instability in the trade and there may be overtonnaging; so you will have a dual-rate system in every trade which applies for it. So that if ever independent ships come in and are strong, they can be forced out." [Transcript, p. 47]

And in this connection, the following are pertinent and supporting statistics, gathered from the Board's official publication *Approved Steamship Conference and Related Agreements* (F.M.B., April 15, 1956) and from other public records at the Board:

Of the one hundred and twenty five (125) conferences on file with the Board, there are three hundred and five (305) foreign flag members and only forty-one (41) American-flag-line members.

In at least twelve of the sixty-two (62) conferences using the exclusive-patronage system there is only one (1) American line. These conferences, showing the foreign-flag and United States-flag membership, are as follows:

Conference Name	F. M. B. Agreement No.	Foreign-Flag Members	U. S.-Flag Members
North Atlantic Westbound Freight Association	5850	9	1
North Atlantic United Kingdom Freight Conference	7100	11	1
North Atlantic French Atlantic Freight Conference	7770	3	1
U. S. Atlantic & Gulf/Australia New Zealand Conference	6200	3	1
Pacific Coast Australasian Tariff Bureau	50-1	4	1
Pacific/West Coast of South America Conference	4630	9	1
Capea Freight Conference	7170	7	1
Gamexico Freight Conference	6670	14	1
Pacific Coast River Plate Brazil Conference	6400	6	1
Pacific Coast/Mexico Freight Conference	7570	7	1
Pacific Coast European Conference	5200	23	1
Association of West Coast Steamship Companies	3302	16	1

In the above conferences, all using the system illegally *without Board approval*, foreign-flag lines dominate by a total of 112 to 12. In only two of the trades, moreover, the North Atlantic-United Kingdom and Pacific Coast European (R. 135, 136) is there even any claim of independent competition, and in at least one of these trades the independent competition has since disappeared.[29]

In various of the Conferences *using the system*, the proportion of Foreign-flag lines to American-flag lines runs, for example:

23 to 1
16 to 1
14 to 1

[29] Mitsui Steamship Co., Ltd., a Petitioner herein, was listed in Mr. Tibbott's affidavit as an independent operator in each trade, but has now joined at least the Pacific Coast European Conference, in which its membership was accepted conditionally upon its withdrawal of a complaint which it had filed with the Federal Maritime Board.

11 to 1
9 to 1
7 to 1
15 to 2
14 to 2
13 to 2
12 to 2
9 to 2
18 to 3
20 to 4
45 to 7

So the perennial tearful pleas concerning the allegation that it is the *American* lines in a Conference which may be "threatened", *by independent American competition,* should long since have lost any appeal.

Another significant design gathered from the Board's statistics is the fact that of the conferences *not using the system* (less than 50 per cent of the total number of approved conferences), sixteen (16) conferences *have no United States-flag member,* as was the case in the recent argument before the Board in *Statement of the Great Lakes-Bordeaux/Hamburg Range Westbound Conference* (Docket 795).[30] That proceeding involved the General Order 76 Application of a Conference, domiciled abroad, consisting of entirely foreign-flag lines, to install the exclusive-patronage system in the trade between the Continent and the Great Lakes. That proceeding disclosed what will prompt these conferences, consisting solely of foreign

[30] Conferences with no American-flag members are as follows: F.M.B. Agreement Nos. 93, 116, 138, 166, 3357, 5300, 7350, 7560, 7820, 7830, 7900, 8130, 8140, 8180, 8250, and 8260.

lines, to install—or attempt to install the system—to wit, the approaching event of one or more American lines entering the trade—as positively portends in the foreign trades in and out of the Great Lakes, when the St. Lawrence Seaway opens.

Isbrandtsen has repeatedly complained to the Board about the fact that some fifty-seven (57) steamship conferences are using the exclusive-patronage system with no independent competition whatsoever, which is contrary to the principles announced even in the Board's own cases.[31]

The Board has done nothing, however, to stop the use of the system in these trades, and has done nothing to effectuate the decision of the Court of Appeals in *Isbrandtsen Company, Inc.* v. *United States*, 211 F. 2d 51 (1954) certiorari denied by this Court, *sub nom. Japan-Atlantic and Gulf Freight Conference* v. *United States*, 347 U. S. 990 (1954), requiring that all such agreements between carriers, including an agreement to use the dual-rate system, be approved by the Board before they could become legally effective. *Only one of these conferences* (the North Atlantic Continental Freight Conference, the approval of which system is

[31] Throughout the Brief, the Board gives lip service to the meaningless principles in the Board's own cases, which do not square with the facts. On page 32 of its Brief, the Board states that, "Absent the finding of grave instability, the Board does not consider the system justified, and it will not permit its use." Again at page 72 of its Brief, the Board states that the system will not be approved where it will "result in a virtual monopoly by the conference lines." Obviously such mollifying standards purportedly adopted by the Board, with the obvious purpose of sustaining its position upon judicial review, mean nothing if they are not followed in practice, which they clearly are not.

now pending review before the Court of Appeals for the District of Columbia Circuit) has ever had its agreement to use the exclusive-patronage system approved by the Board.

Certainly these facts bespeak little in support of the alleged protection given to American-flag lines by the exclusive-patronage system. The question naturally arises, Whom is the Board protecting and from what? There are over seventy-five (75) American-flag liner companies engaged in the foreign commerce of the United States. Only forty-one (41) of these lines belong to any conference, and only twenty-four (24) are members of conferences which employ the exclusive-patronage system. In over ninety per cent of the latter conferences, in which United States-flag lines are members, *where the system is used,* there is no independent competition. The Board's arguments concerning the public importance of its position are certainly misconceived.

D. Proceedings in the Court of Appeals.

The travesty of Board procedures was continued even after the Petition to Review the Board's decision approving the system had been filed, with the Board only thereafter issuing an Order and then an Amended Order.

The Board's Report approving the institution of the exclusive-patronage system as of January 1, 1956, was not served upon the public until Friday, December 14, 1955 (R. 19). This Report at the time of service was not accompanied by an Order as is usual in an administrative adjudicatory decision. Because of the

shortness of time before the system would have become effective (a large part of which was the intervening holiday season), and because the Report did not even specify whether the system would become effective as of Tokyo time or Washington, D. C. time (the former being one and one-half days earlier), Isbrandtsen was compelled to filed its Petition to Review promptly with the Court of Appeals, asking for a temporary stay of the Board's Report (R. 2).

On the day of the filing of the Petition to Review, December 19, 1955, Isbrandtsen's attorney delivered a letter to the Board, calling the Board's attention to the filing of its Petition, which was also delivered, *and to various formal deficiencies in the Board's Report, including the lack of an accompanying Order* (R. 85).

The Board, on December 21, 1955 (seven days after service of its Report), served its First Order in the administrative proceeding, specifying, *inter alia*, that the system was approved "effective January 1, 1956, at 12:00 noon Eastern Standard Time" (R. 73). On January 11, 1956, the Board served its *Second Order* eleven days after the system would have become effective according to the Board's original Report (R. 75).[32]

In the original Report, the Board stated that, "we disapprove the [exclusive-patronage] contract form insofar as it purports to cover F.O.B., or F.A.S. sales" (R. 65). The first Order of the Board reaffirmed the approval of the system effective January 1, 1956, "excepting that said contract system shall not apply to shipments which are made on an F.O.B., F.A.S., or ex

[32] Isbrandtsen's Petition to Review was amended so as to include Review of the Board's Supplemental Orders.

godown basis or to the transportation of cargoes in refrigerated compartments" (R. 74).

The second Order of the Board, served on January 11, 1956, apparently attempted to accomplish a major and fundamental change in the exclusive-patronage contract, by stating that the system would not apply to F.O.B. or F.A.S. shipments "unless the person whether seller or buyer named as shipper in the ocean bill of lading is a contract signatory" (R. 76). The language of the second Order has remained a continuing mystery to Isbrandtsen, and there were no findings whatsoever, either in the Report or in the Supplemental Order, to support what was apparently a new conclusion. Isbrandtsen, therefore, filed a Motion with the Court of Appeals below to remand the second Order of the Board for a proper recitation of the circumstances and reasons prompting it, and for proper findings of fact pursuant to the requirements of the Administrative Procedure Act (R. 77). The Court below finally declared this Motion to be moot, in view of its decision holding the system to be illegal.

The Petition to Review named the United States and the Federal Maritime Board as Respondents (R. 2). The United States, represented by the Attorney General, was the statutory Respondent under 5 U.S.C. sec. 1037. The Federal Maritime Board was added as a Respondent, pursuant to a Rule of the Court of Appeals. The Department of Justice joined Isbrandtsen in attacking the validity of the Board's Orders and the legality of the exclusive-patronage system. Thereafter, the Secretary of Agriculture, the largest shipper in the foreign commerce of the United States, inter-

vened in support of Isbrandtsen's position, and the Japan-Atlantic and Gulf Freight Conference intervened as a Respondent-Intervenor in the support of the Orders of the Board.

E. Decision Below.

In the opinion by Fahy, J., *the Court unanimously held that the exclusive-patronage system was fundamentally unlawful and in violation of Section 14, Third of the Shipping Act of 1916.* In reaching this decision, the Court did not meet the other issues raised by the Petition to Review, concerning the necessary and unavoidable illegality of the system under Sections 15, 16, and 17 of the Shipping Act, and concerning the unconstitutionality of Section 15 of the Shipping Act, if the Board interpretation of the statute were upheld.

Specifically, the Court below held that:

> "Since the dual rate system here constitutes retaliation it must be condemned without regard to the question of reasonableness, as are deferred rebates" (R. 243).

The Court went further, however, to hold that the type of discrimination condemned by section 14, Third of the Act was *absolute discrimination*, and that *Congress had deliberately left out the qualifying words "unjust" or "unreasonable"*, which the Board and Conference had contended should be read in (R. 245). It held that any discrimination against a shipper as a reprisal or retaliation was illegal under the Act. The Court pointed out that, elsewhere in the Act, certain practices were made illegal only if they were unjustly discriminatory.

"But it is significant that when Congress came to the matter of retaliation against a shipper it did not permit this particular type of conduct to be engaged in or to be approved by the Board if it involved any discriminatory method" (R. 245).

Under these circumstances the Court stated that:

"We think it clear not only that the liquidated damage provision is discriminatory but that a 9½ per cent differential for exactly the same service and facilities is of like character" (R. 245).

The Board at page 9 of its Brief mistakenly asserts that the Court "has accepted the Board's finding that the dual rate system is not 'unjustly discriminatory' ". No such acceptance of the Board's argument was given, at all, because the Court did not reach the issue of unjust discrimination under Sections 15, 16, or 17 of the Act. It must be emphasized that Isbrandtsen had stipulated the facts in the Board's Report, and the Court has done nothing more than to say that even if the Board's contentions concerning the need for the dual rate system "in promoting stability of rates and regularity of service" were true, that such an argument is irrelevant when considering the illegality of the system under section 14, Third (R. 242, 243).

The concurring opinion of Washington, J. is fully consistent with the Court's main opinion and it was concurred in by all the judges. Judge Washington answered further the misconceived arguments of the Board, concerning the meaning of retaliation under Section 14, Third and the Board's interpretation of the

case of *Swayne & Hoyt* v. *United States*, 300 U.S. 297, 303 (1937) (R. 246). He went on to point out that Congress could not have "impliedly approved" this particular exclusive-patronage system, as the Board had contended, because it involves a contract of a type that was not before the Congressional Committee when the statute was enacted (R. 247). Judge Washington's conclusions are eminently sound and well reasoned and certainly have not been refuted in any way by either the Board or the Conference.

The Board, on page 35 of its Brief argues that Judge Washington has held that certain requirements contracts would be legal under the Act. The concurring opinion does no such thing. It merely states that were the Board's argument sound that the present type of exclusive-patronage contract had been before Congress prior to the enactment of the Act, "the argument would have some merit" (R. 247). As it was, he found the argument to be without any merit.

The Court below has thoroughly considered and analyzed each of the arguments now advanced by the Board and the Conference. Because the Court found that the exclusive-patronage system was unlawful under Section 14, Third of the Shipping Act, it did not meet or discuss the various other questions of fundamental illegality raised by the Petition to Review. Such additional issues are, however, open for decision by this Court, and Isbrandtsen considers them to be equally as formidable objections to the system as the violation of Section 14, Third.

SUMMARY OF ARGUMENT

Introduction

Although hardly apparent from the Briefs of Petitioners, the controversy here concerns the exclusive-patronage system and not the Conference system, as such. Fundamentally, the question is whether Conference lines, in addition to "controlling, regulating, preventing, or destroying competition" *as among themselves*, may also, through the device of the exclusive-patronage system destroy the competition of independent common or contract carriers who may not wish to become, or cannot legally become, parties to the conference agreement. The Shipping Act gives no express or implied authority to the Board to approve such a practice.

The exclusive-patronage system involves a complete departure from the traditional standards of common-carrier rate making and common-carrier obligations. *The purpose and inevitable result of the system is the destruction of all independent competition in the trade involved.* That independent competition is effectively eliminated by the use of the system is proven by Isbrandtsen's almost complete lack of success in competing against Conferences using the system in the trade from the Philippines and Hong Kong, and even more vividly by the fact that of some fifty-seven (57) of the sixty-two (62) conferences, [of the one hundred and twenty-five (125) steamship freight Conferences on file with the Board], *now using the system, are faced with no independent competition.* The Board, in the

past, on various occasions, has admitted that the basic purpose of the system is to eliminate all independent competition, and that *if the system "is wholly effective it will result in a complete monopoly" for the conference lines.* There can scarcely be any doubt that Isbrandtsen, as an independent carrier, could not continue in this trade in competition with such an effective exclusive-patronage system.

The Members of the Federal Maritime Board, themselves, have publicly stated their confusion as to how a situation arose, where at least sixty-one (61) conferences are now using the exclusive-patronage system, *without Board approval*, in direct contravention of the decision in *Isbrandtsen Company, Inc.* v. *United States*, 211 F. 2d 51 (C.A. D.C., 1954) and two other decisions. Such confusion has been amply exhibited in practice because the Board has done nothing to stop this flagrantly illegal conference activity in the three-year period since the decision in the *Isbrandtsen* case, and in a recent Board decision it has stated that it has no power "to suspend or stay approved or *inapproved* agreements between carriers", although it had previously argued to this Court that it did have such power and others.

Neither the Board nor the Conference has ever discovered one single authority which would lend direct or specific support to their position that the system is legally permissible. They have been forced rather to rest their entire case on so-called "implied approval". Such inferences of "implied approval" they claim to discern from (1) the lack of a specific condemnation of

the sytem in *haec verba* in the Shipping Act, (2) the failure of a *preliminary report* of the House Merchant Marine and Fisheries Committee in 1914 to specifically condemn it, and (3) the failure of the Courts to decide the issue of legality, even though the issue was never before the Courts. The arguments of Petitioners constitute nothing more than grasping at straws, which were quickly and correctly dismissed by the Court below after a thorough analysis. Congress did condemn the system, in principle, at the very least, in the Shipping Act. It is unthinkable that Congress would or could authorize the legality of such a predatory system by *implication*, which would involve a partial repeal of, and exemption from, the Anti-trust Laws. The approach of "implied approval", involving an exemption from the Anti-trust Laws, is contrary to all recognized authority concerning statutory exemptions from the Sherman Act.

I

Section 14, Third is amply clear on its face, without any resort to legislative history, and the exclusive-patronage system clearly violates the statutory proscriptions therein, as the Court below has found. The Board itself recognizes that a "literal reading" of the statute would prohibit the use of the system. Section 14, Third is intended to prohibit direct or indirect "retaliation" by a common carrier, or group thereof, or "resort to other discriminating methods" against a shipper because the shipper "has patronized any other carrier" or has taken some other action which Congress considered he had a perfect right to do.

There can be no question that the exclusive-patronage system is "retaliatory", or that it involves "resort to other discriminating methods" against the shipper who refuses to sign the exclusive-patronage contract, or against the shipper who would sign such an illegal contract and thereafter use a non-conference carrier. It would provide for charging the non-signer the higher penalty non-contract rate, and it would impose severe retaliatory penalties on the latter contract shipper who would "violate" his contract. It is unimportant whether such "retaliatory" or "resort to . . . discriminating methods" is taken because the shipper "has patronized any other carrier" or because he has refused to sign or to be bound by the exclusive-patronage contract not to patronize and to "boycott" any other carrier. Either type of retaliation or discriminatory action by common carriers is specifically outlawed by the statutory provisions, as the Court below has found.

It cannot seriously be contended that Congress "overlooked" the insertion in Section 14, Third of such qualifying adjectives as "unjustly" or "unfairly" in proscribing "discriminating" conduct by common carriers. Congress obviously intended to prohibit any type of discrimination against a shipper taken as retaliation or reprisal against him because he had done something which he had a perfect right to do, including his refusal to sign an exclusive-patronage contract with the common carriers, or his patronizing of another carrier. That such *absolute* discrimination was intended to be proscribed is not only clear on the face of the statute but also from the fact that the House Committee had

originally recommended language which would have established a qualified proscription of discrimination, but such qualifying words were deliberately omitted by the drafters of the Shipping Act and by Congress.

There is certainly no necessity to resort to legislative history to determine the clear and unambiguous meaning of any relevant provision of the Shipping Act. The Board's approach of refusing to apply what the statute clearly says, but rather to inquire continually into what the Board chooses to think the legislature meant, is fundamentally improper. Nevertheless, there is no direct support for Petitioners' position to be found anywhere in the legislative history. The Board and the Conference rely entirely on a preliminary or interim account of hearings held by the so-called "Alexander Committee" in 1914, two years prior to the passage of the Act. Their *only* argument concerns a summary in this interim account of Committee proceedings, of certain self-serving *arguments* made by interested witnesses appearing before the Committee. There is not one single word of approbation in this preliminary summary of the Committee, or elsewhere in the legislative history concerning *any* type of exclusive-patronage system.

It seems clear beyond any doubt that the exclusive-patronage *pre*ferred rebate system, the modern counterpart of the exclusive-patronage *de*ferred rebate system, was not in use in 1914, when the Alexander Committee held its hearings, or at any time prior to the enactment of the Shipping Act, as the Court below has found. The system was, therefore, incapable of any "implied congressional approval" as contended for by

the Board and the Conferences. The Shipping Board found in 1926 that the present-type exclusive-patronage *pre*ferred rebate system was first used in 1922, six (6) years after the enactment of the Shipping Act, and then applied to only one commodity. These facts are corroborated by information supplied to the Board by the Conferences themselves.

Even if the system had been in use when the Act was drafted and passed, however, there would be no force to Petitioners' arguments, for not one single word of approbation was given to any such system in any recommendation of Congress. In the Final Report accompanying the Shipping Bill, the Committee recommended that all "rebating of freight rates to shippers be made illegal". Congress also made it plain that they were prohibiting any common carrier from "retaliating against any shipper who refuses to use that particular line in the shipment of his freight", and that "ordinary rebates . . . just as obnoxious to common sense and good reason", as deferred rebates, were prohibited. These proscriptions are written plainly in the Shipping Act.

II

Except in the Briefs filed by the Board and by Conferences with the Courts, it has generally been conceded that, until the decision of the Court below, herein, there had been no definitive judicial decision on the legality or illegality of the exclusive-patronage system. This undeniable posture of the cases has in fact been publicly admitted by the Board's Chairman in his testimony before the House Merchant Marine and

Fisheries Committee, six days after the Board had filed herein its Petition for certiorari with this Court, and it has been found similarly in every judicial decision that has ever considered the point. It is preposterous, and will undoubtedly come as a considerable surprise to this Court, itself, that Petitioners would contend that this Court has previously held the system "not unlawful *per se*" or "lawful *per se*", *by implication*, not only through a footnote to a case *not involving the issue*, but also through its action of remanding cases to the Board, on the ground that the Board had *primary* jurisdiction to determine *factual* circumstances, or through its action of remanding cases to the Board because of the Board's traditional and inherent procedural deficiencies, such as no hearings or findings, or even consideration of "approval", after the Courts had specifically held such approval was necessary as a condition precedent to use.

III

The Board's administration of the Shipping Act concerning the exclusive-patronage system has been anything but consistent, as was found by the Statutory District Court in *Isbrandtsen Company v. United States*, 96 F. Supp. 883 (S.D. N.Y. 1951). Prior to the Second World War, the issue of illegality of the system under Section 14, Third of the Act had not been specifically discussed in any Board decision. The first case of the Shipping Board to consider the system in 1922 had held it fundamentally illegal, as "unjustly discriminatory" and "unduly prejudicial" *under Sections 16 and 17* of the Act.

After World War II the issue of the illegality of the system *under Section 14, Third* of the Act was first raised before the Board in 1948, in the first cases in which the Department of Justice and Isbrandtsen appeared as opponents of the system. Since that time there has been a continuous attempt to obtain a final decision from the Courts on the fundamental legal issues, which efforts, until now, have been unavailing, largely because of the Board's own procedural deficiencies and delaying opposition. In its *post-war* opinions, the Board has striven to justify the use of the system, starting from its preconceived notion that the system was legal, on a variety of misconceived and inconsistent theories under Sections 14, Third, 15, 16, and 17 of the Act. The so-called "principles" announced in these cases of the Board, if applied, which has not been done, would themselves prohibit the use of any exclusive-patronage system.

IV

Even irrespective of the unavoidable illegality of the exclusive-patronage system under Section 14, Third of the Shipping Act, the system is fundamentally unlawful for various other substantial reasons, which issues it was unnecessary for the Court below to meet, in view of its decision holding the system illegal under Section 14, Third. These additional and further obstacles which the system would have to pass muster, in order to be rendered legal, are of great importance, *and such issues are now before this Court;* they constitute further cogent reasons why the Judgment of the Court below should be affirmed on even broader grounds

than announced in the Opinion below. Such additional grounds for holding the system illegal are as follows:

A. The system is necessarily and fatally illegal because it is "*unjustly discriminatory*" and "*unduly prejudicial*" in violation of Sections 15, 16, and 17 of the Shipping Act, because it involves the charging of different rates to *identically situated shippers for identical transportation services.*

B. The Board could have no discretion or jurisdiction to approve the system because it involves as its main and most essential ingredient an exclusive-patronage contract entered into between common-carrier conference lines and *shippers, the latter parties not being "persons" subject to the Shipping Act, nor, therefore, capable of receiving any immunity or exemption from the Anti-trust Laws, which might be given by the Board to carriers pursuant to Section 15 of the Act.* This Court has previously held that such exclusive-patronage arrangements, stripped of any immunity, are fundamentally violative of Sections 1 and 2 of the Sherman Act.

C. The Board's interpretation of the Shipping Act would render Section 15 of the Act unconstitutional. It would involve *an unlawful delegation of legislative authority to an administrative agency, which in turn would be passed on by the agency to private monopolistic cartels,* in violation of Article 1, Section 8, paragraph 18 of the Constitution of the United States. Such interpretation would, moreover, give the private monopolists the absolute power to exclude any independent carrier, whether common or *contract* carrier, from the conference trade, and *would exceed the extent*

of permissible deprivation of property without due process of law, in violation of Article V of the Constitution. *Contract carriers, or so-called "Tramps" could never join the conference*, moreover, *even though the commodities which they would ordinarily carry would also be carried by the conference lines*, because they are not "common carriers" subject to the Shipping Act. Such carriers would have to become common carriers or retire from business. This would be the equivalent of giving the private monopoly the power to issue certificates of public convenience and necessity, with no statutory guide for their issuance.

ARGUMENT

Introduction

Although it is not completely apparent from the Briefs of the Petitioners, *the controversy here concerns the exclusive-patronage system and not the Conference System, as such.* Isbrandtsen has not raised any issue, either before the Board or in its Petition to Review, with respect to any Conference practice of fixing *uniform* rates as between Conference member lines, so long as such rates apply equally and uniformly to all shippers without the invidious discriminations inherent in the exclusive-patronage system.[33] Fundamentally, the question is whether the Conference lines, in addition to "controlling, regulating, preventing, or destroying

[33] As previously pointed out, *supra*, pages 18 and 34, the evidence shows that the Conference Member lines traditionally have not adhered to their *own* published tariff and have been guilty of secret rebating and other malpractices in violation of the Act [Sec. 16(2)] and their own Conference agreement.

competition" as among themselves, may also through the device of the exclusive-patronage system destroy the competition of common or contract carriers who may not wish to become, or cannot legally become, parties to the conference agreement. Nowhere in Section 15, or in any other Section, of the Shipping Act, 1916, is there any authority given to any Conference or any carrier to employ dual rates or to employ an *exclusive-patronage* system of any type.

Both the Board and the Conference make substantially the same three main points in their arguments, namely, (1) they argue that the Court below was wrong in interpreting Section 14, Third of the Shipping Act, (2) that the legislative history of the Act demonstrates that Congress "did not intend to prohibit the dual rate system", and (3) that the decision below is in conflict with prior Court and Agency decisions.

The Court below did not go beyond the single issue of illegality under Section 14, Third of the Shipping Act, holding correctly that the system was necessarily and unavoidably unlawful in contravention of the statutory proscriptions therein contained. There are, however, equally serious further objections of illegality to the exclusive-patronage system—even if the system were able to pass muster the proscriptions of Section 14, Third. These other provisions of law which the system would violate are several.

At the very least, the system would be unduly prejudicial and unjustly discriminatory in violation of Sections 15, 16, and 17 of the Shipping Act.

Furthermore, the system could never be legally approved because the cornerstone of such system involves

an agreement between carriers and *shippers*, the latter not being subject to the Shipping Act and incapable of receiving any immunity from the Anti-Trust Laws.

Most importantly, should the Board's interpretation of legality "*per se*" be held valid, Section 15 of the Act would be rendered unconstitutional.

A. Nature of the Exclusive-Patronage System.

The exclusive-patronage system involves a complete departure from the traditional standards of common-carrier rate-making and common-carrier obligations. It is remarkable that anyone could contend that such a system, intended to monopolize the trade for Conference carriers and to destroy all competition, could, at least, without specific Congressional authorization, ever be subject to approval by the Federal Maritime Board so as to afford the system immunity from our Anti-Trust Laws. The astonishing nature of this system is most vividly delineated by a mere summary of its salient and admitted features:

(1) Two sets of rates—one of which is higher by an arbitrary differential of 9½ per cent—are charged by the *common carrier* Conference lines for *precisely the same transportation service;*

(2) The sole consideration entitling a shipper to the lower "contract" rates is his agreement not to patronize—i.e., to boycott—any non-conference carrier;

(3) There would be little or no consideration for such contract given on the part of the Conference lines, and neither the Conference nor its member lines would guarantee to provide any certain amount of shipping

space to the contract shipper or guarantee to carry such shipments as he would offer;[34]

(4) The discrimination in rates is entirely unrelated to volume or frequency of shipments—indeed, the contract shipper would undertake no obligation to ship any freight at all;

(5) The higher non-contract rates would be exacted from shippers solely because they would refuse to sign a contract to employ the Conference lines' vessels exclusively and refuse to agree not to patronize any independent carrier;

(6) The contract shipper would be subject to severe retaliatory penalties for employing the service of an independent carrier, including being compelled to pay the higher non-contract rates and becoming liable for

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[34] Under the exclusive-patronage contract between the Conference lines (signed, however, by the Conference Secretary) and the contract shippers, the consideration flows entirely from the shipper. The Conference lines promise to do nothing that they would not do in the ordinary prudent conduct of their business, nor which they are otherwise obligated to do under their legal obligations as common carriers. They *do not guarantee the contract shipper any certainty of shipping space or service* under the exclusive-patronage contract (R. 203). The lack of any consideration on the part of the Conference lines is well summarized at page 5 of the Conference Brief as follows:

> ". . . the Petitioners [i. e., the Conference lines] operate their vessels for their own account and profit; conduct their own businesses in such manner as their respective managerial judgments may determine; build such ships to be used in the trade as they may think appropriate; have as many or as few sailings as they may deem best; . . ."

Even if such an exclusive-patronage agreement in restraint of trade were not illegal and void, the consideration would have to be adequate, not colorable, and the restriction would have to be reasonable. *Oregon Steam Nav. Co.* v. *Winsor*, 20 Wall. (U. S.) 64 (1874).

50 per cent of the freight which he would have paid at Conference contract rates;

(7) The exclusive-patronage contract—*the key to the system*—would be entered into between the Conference acting for its member lines and shippers for an indefinite period of time;

(8) Because the Conference lines collectively offer a greater and more comprehensive service, many shippers would be coerced into signing exclusive-patronage contracts; and

(9) The intended and inevitable result of the exclusive-patronage contract system would be to monopolize the trade in the hands of the carriers employing the system.

B. The System Would and Does Destroy All Independent Competition

There can scarcely be any doubt that the purpose and inevitable result of this or any other exclusive-patronage system is the destruction of all independent competition in the trade involved.

The use of the system in this particular trade during the pre-war years did in fact eliminate all liner and virtually all tramp competition, as the Board has found (R. 25). There are countless examples of the destruction of independent competition by the use of the exclusive-patronage system, which certainly completely refute the fantastic and unfounded prognostication by the Board in this case that Isbrandtsen would carry approximately 16 per cent of the cargo after the system had been instituted (R. 34).

Speculation over the fate of Isbrandtsen or any other line, as an independent, in competition with a conference using the exclusive-patronage system is unnecessary—one need look no further than the services in this trade from the Philippines and Hong Kong, where the system is now in use. These facts are set forth in the Board's Report and are peculiarly related to the use of the system in the trade from Japan, for, as has been pointed out, no carrier exists upon Japanese cargo alone. During the period between 1950 and 1952, shown in the Board's Report, Isbrandtsen, in competing with the Conference lines using the exclusive-patronage system from the Philippines, provided slightly more than *thirteen (13) per cent of the total sailings and carried less than two (2) per cent of the total cargo moving in that trade* (R. 27). This is a graphic and vivid example of the inevitable effect of the exclusive-patronage system on independent competition. Any suggestion that a different result would follow in this case obviously has no relation to reality and is not founded on any proof.

Isbrandtsen has been persistent in not succumbing to the pressures of these foreign-dominated steamship cartels. Over the years, other operators which have maintained such independence have been forced to submit. As has been pointed out, sixty-two (62) conferences now use the exclusive-patronage system, and the Chief of the Board's Regulation Office in his Affidavit submitted to the Court below could find independent of non conference competition in the cases of only eight (8) conferences (R. 133). As we have pointed out (pages 49 to 54, *supra*), there has been a steady

attrition of even this minimal competition. At the present time, only seven (7), at most, of the sixty-two (62) Conferences using the system have any independent competition, and in at least two (2) of these trades (Atlantic-Malay States and Atlantic-Far East), the competition of Isbrandtsen (which is the only competition listed) is practically non-existent, by reason of the fact that Isbrandtsen's vessels do not make direct sailings in the trade. For all practical purposes, therefore, only five (5) of the sixty-two (62) conferences using the system are confronted with non-conference competition.

These are the facts concerning the results of the system which its proponents must admit. It is absolutely contrary to fact for the Board and the Conference to indulge in mollifying nonsense about the differential not being so great as to drive the independent line out of the trade, as they have done in their briefs (Bd. Br., p. 9; Conf. Br., p. 17). The plain fact is that no independent can continue to exist if all of the customers are tied up in exclusive-patronage contracts, and, moreover, no independent can, thereafter, arise or enter the trade.[35]

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[35] In addition to other reasons cited herein, a shipper is coerced into signing the exclusive-patronage contract, in order to obtain the lower contract rates, by the fact that the differential between the contract rate and the non-contract rates often approximates his margin of profit, as the Board has found (R. 68). Likewise, by the same coercion, he would be compelled to continue to patronize the Conference lines, during the indefinite term of the exclusive-patronage contract, without being able to take advantage of any lower rates which might be offered by any independent carrier, if there could ever be an independent available, because during the three months' period required for the shipper to give notice to the

The Board in the past has been more frank in admitting this unmitigated purpose and inevitable result of the system. Its own counsel made the following statement to the statutory District Court in *Isbrandtsen Company, v. United States*, 96 F. Supp. 883 (S.D. N.Y., 1951):

> "That the purpose of the dual-rate provisions was, if possible, to bring about a condition in which an independent carrier [such as Petitioner, Isbrandtsen] could be compelled (through loss or threatened loss of profits) either to join the Conference or go out of business."
>
> " . . . [I]f a contract system is wholly effective it will result in a complete monopoly. . . Necessarily, in these circumstances, there would be no service by independent operators."

The Board's attempted prognostication of Isbrandtsen's continued participation in this case (R. 34) is to be contrasted, moreover, with the expressions of the Board's Chairman in the companion case, *Statement of Trans-Pacific Freight Conference of Japan*, Docket No. 743, covering the same trade from Japan but to the Pacific Coast of the United States. The *Trans-Pacific* case was decided on December 19, 1955 (one week after the Board's decision in the instant case), *but was not served on the public until March 5, 1956.* In his dissenting opinion, the Board's Chairman makes his views precisely clear:

Conference of the cancellation of his contract, he would be precluded from taking advantage of the lower rates of the independent even though they were necessary, profitwise, to permit him to stay in business.

> "In considering an application to institute a dual rate system *in any trade, we must recognize the immediate purpose of the system, simply stated, to be the elimination of non-conference competition, as such,* . . ." (Mimeographed Report, page 33).

With respect to prognostications of how much cargo the conference or independent would carry after the system were to go into effect, the Board's Chairman stated:

> "such a test must necessarily be based *wholly on pure speculation* as to relative amounts of cargo which will be carried, after initiation of a dual rate system, by conference and non-conference carriers." (*Ibid.*)

The Chairman left no doubt that approval of the system contemplates that all independents would be forced to join the Conference or go out of business:

> "To test the validity of a dual rate system by its effect on independent operators is to permit the tail to wag the dog . . . The non-conference operator's handicaps in the face of a dual rate system, . . . are self assumed." (Mimeographed Report, page 34).

If any result contrary to the above facts and Board admissions were to occur, why has the Board allowed some fifty-seven conferences to use the system after they have driven out all independents and are confronted with no competition? This anomalous situa-

tion has been brought to the Board's attention on various occasions by the written complaint of Isbrandtsen, and, for the most part, no written reply has even been received. The astonishing situation was again alluded to by Counsel for Isbrandtsen in an argument before the Board on September 17, 1957, involving the attempted use of the system by a group of entirely foreign-flag lines in the trade from Europe to Canada and to Great Lakes' ports of the United States [*Statement of the Great Lakes-Bordeaux/Hamburg Range Westbound Conference*, Docket 795]. The matter was the subject of questioning of the Board's Public Counsel by the Board Members, *at least one of whom indicated that he did not know how the various conferences now using the system had ever obtained the authority.* The following colloquy took place among Board Member Guill, Mr. Schmeltzer, the Public Counsel, the Board's Chairman, Mr. Morse, and Board Member Stakem.

"Mr. Guill: May I ask you this, what about all these conferences that have a dual rate system that are now in effect? How did they get them in the first place?

"Mr. Schmeltzer: There have been many recent cases that we have to follow. One of them is 211 F. Second, Isbrandtsen v. United States—I think 211 F. Second, '55—which says the dual-rate system is something that must be approved by the Board specifically.

"The cases you are talking about happened long before that, sir. The law as it now stands requires the Board to approve the dual-rate system in any case before it goes into effect.

"Incidentally, I would like to say one further thing.

Where there is a dual-rate system in effect and shippers are being hurt or an independent carrier is being hurt, it can bring an action before the Board and have the Board take away the approval of the dual-rate system.

"The Chairman: All right. Now, under your theory, in the situation where there is an existing dual-rate system, assuming it has been approved by the Board, a year goes by say and there is no overtonnaging; there is no non-conference competitor in the trade.

"Should the Board then withdraw the privilege of having a dual-rate system?

"Mr. Schmeltzer: If there are complaints about such a thing, the Board will listen to the complaints, have a hearing and determine whether there is a need for the dual-rate system.

"The Chairman: Well, suppose Mr. Isbrandtsen comes in and says, "I haven't decided what I want to do, but maybe sometime I want to go into that trade."

"Mr. Schmeltzer: Well, even if he does go into the trade, there is no danger of instability at that time. You are saying that as long as there is a non-conference carrier anywhere in the world that the dual-rate system can be used in any trade in the world, then you are saying that the dual-rate system is legal per se, and the Act does not say that and the legislative history does not sanction that. This was to prevent——

"The Chairman: Well, does the Act say the dual-rate system is unlawful per se?

"Mr. Schmeltzer: It does not say it is unlawful per se. That I worked very hard to prove.

"The Chairman: Well, if it doesn't say it is unlawful per se, then it is automatically lawful per se.

"Mr. Schmeltzer: No, sir, not by any means. It is neither lawful nor unlawful per se.

"The Act says in my opinion the law has power to approve a dual-rate system if it meets the standards of Section 15.

"The Chairman: Well, you and I are not talking the same language. Every Section 15 agreement has to be approved.

"Mr. Schmeltzer: That's right. If there is approved Section 15 agreement which encompasses the dual-rate system, then it is legal because the Board has said that it follows the standards of Section 15. That doesn't mean that every time a conference wants to institute a system it is automatically lawful.

"Things do not have to be either lawful per se or unlawful per se. These things are subject to the Board's discretion which it should exercise under the standards it sets up in liner cases.

"The Chairman: All right, now, let's get back to my situation, though, where there is an existing dual-rate system and there is stability, there is no non-conference competition.

"Mr. Schmeltzer: There is stability, there is no non-conference competition.

"The Chairman: And there is not overtonnaging.

"Mr. Schmeltzer: You are describing this trade I think, in my opinion you are.

"The Chairman: No, I am saying a situation where there is an approved, existing dual-rate system.

"Mr. Schmeltzer: Oh, I see.

"The Chairman: Under your premise, aren't we then obligated to withdraw that dual-rate system?

"Mr. Schmeltzer: I think there would be an impossible policing job to do that. I think the Board would have so many hearings——

"The Chairman: That is one of our burdens.

"Mr. Schmeltzer: I think where there is a complaint, the Board has to hear it and see if it should be disapproved or not.

"The Chairman: I agree on that. We have to hear it if there is a complaint.

"Mr. Schmeltzer: I think there is no reason that because the policing action cannot be perfect in all cases, that this theory doesn't hold water, where there is a proceedings

"Mr. Stakem: Do you agree generally with Mr. O'Connor's statement out of the sixty-seven dual-rate systems in existence there are only about eight in which there is non-conference competition?

"Mr. Schmeltzer: It is not in this record.

"Mr. O'Connor: Yes, it is. Not in this record, it is in the Supreme Court record.

"Mr. Schmeltzer: It is not in this record.

"I think there aren't too many, we will check it and let you know if it is a matter of fact we can provide very easily. I think it is probably correct.

"Mr. Guill: On the basis, then, if in the Board's finding the dual-rate system is not legal per se except under certain standards, why shouldn't those agreements be withdrawn if they are not using them?

"Mr. Schmeltzer: If they are not using them, why shouldn't they be withdrawn?

"Mr. Guill: That's right; if it is merely a matter of

restraining competition as Mr. O'Connor says, and apparently that is what it is on the face of the thing.

"Mr. Schmeltzer: Not under any opinions of the Board, not under Mr. Morse's—you are putting me in the position here now of saying it has got to be one or the other.

"No, the Board has had standards, they have had them for years. The fact the standards could not always be effectuated is another matter. When we have a proceeding we have to follow the standards in other proceedings."

After this considerable questioning, concerning the hopeless dilemma of the Board's non-regulation of the steamship conferences, the Board's Public Counsel was finally forced into a position of admitting that the Board had been obviously delinquent in allowing the many conferences which use the system to do so without approval, as witnessed by the following colloquy:

"Mr. Guill: If they are not meeting the standards, should they be allowed to keep the dual-rate system?

"Mr. Schmeltzer: No, they should not. If the trade —*I am being forced to take a position here and I think it might be a good time to take it*, I think that 211 F. Second, the Isbrandtsen case, the Board has got to review every dual-rate system and see if there is any need for every outstanding dual-rate system that is not given its approval.

"The fact is that it was an impossible job I think for the Board to do at that time. I think the Board should get busy and do it as soon as it is feasible. I

think it wouldn't have been very good for Mr. O'Connor because he would have been spread so thin at that time—

"Mr. O'Connor: I kept demanding it time and again but I got no response.

"The Chairman: What other points do you have to make?"

This travesty enacted by the Board in its administration of the Shipping Act is amusing, if it were not so serious to the persons concerned. The Board has showed no concern with the active regulation of steamship conferences. Its primary efforts have been devoted toward the development of theoretical so-called "principles" that are never put into practice, and which would become academic after all non-conference competition had been eliminated. Academic or moot, however, the Board, in theory, *but not in practice,* still clings to them.

We repeat, therefore, that the system must be judged on the obvious factual basis that it will destroy all independent competition, including that of Isbrandtsen, once it has gone into effect. The *ex cathedra* observation of the Board, in its Report, that ten per cent of the cargoes would remain for Isbrandtsen is contrary to any proved fact and wholly unrealistic, and, as the Board's Chairman has admitted, is based on "pure speculation". This "speculation", we urge, is not even serious. It is crystal gazing. Isbrandtsen would be at the complete mercy of the Conference once the system had been put into effect, and would have no recourse when its carryings fell below said ten per cent,

or when they were reduced to zero.[36] No more eloquent proof of this may be offered than the present situation where approximately fifty-seven Conferences, by the Board's own admission, are now using the system, without any independent competition—and the Board is doing absolutely nothing to stop them. The Board members themselves are confused as to how such a situation arose and as to why it has not been attended to by the Board. Of course, once all independent competition has been eliminated, the protection of such independent competition by the Board becomes a matter which is entirely academic and moot—a situation

[36] Although the Board had previously argued to this Court in *Isbrandtsen Company* v. *United States*, 211 F. 2d 51 (C. A. D. C., 1954), cert. denied 347 U.S. 990 (1954), that it had "plenary power over all Conference activity," including the power to "disapprove, cancel or modify any agreement" in any manner as it might deem proper, and the power to "direct the conference to suspend rates under sanction of cancellation of the basic agreement," the Board has since denied this power in *Agreement Pertaining to Brokerage of Pacific Coast European Conference* (Docket 767, decided December 2, 1955). In that case, the Board found that the Conference was operating under an unapproved modification of its basic agreement—one that the Board's Regulation Office had specifically rejected—and that the carriers had deliberately adopted the modified agreement on October 5, 1954 and applied it retroactively to September 29, 1954. Not only did the Board flatly disavow any power to stop this illegal conference activity, which it had represented it had to this Court, in the previous appeal of the Board's action in this very Japan-Atlantic and Gulf Freight Conference case, but it refused to submit the case to the Department of Justice for appropriate action. The Board stated specifically that it considered itself "to be without authority, express or implied, to suspend or stay approved or *un*approved agreements between carriers." In other words, once a *basic* conference agreement has been approved by the Board it is inviolable and immune from further regulation as to any practices of the Conference, under it or outside of it!

which the Conferences have practically succeeded in accomplishing. The Conference involved in this case seeks to join the legion of 62 victors.

C. The Arguments of the Board and Conference Rest on So-Called Implied Approval

The Board and the Conference have always grasped at the slightest straw in an effort to find the faintest color of authority which would sustain the legality of the exclusive-patronage system. In these entire arguments, not one statutory provision, legislative recommendation, or judicial decision can be pointed to which would give any specific or direct legitimacy to their arguments. Neither the Board nor the Conference has ever found a case,[37] under the Shipping Act or any analogous transportation statute, which has approved such a predatory and monopolistic practice, contrary to all transportation law. The Board and Conference arguments, which all rest upon "implicit" "approval," spun out of lack of specific "condemnation," can be summarized as follows:

(1) It can be inferred from the statute that the exclusive-patronage system is not unlawful because it has not been condemned specifically by name;

(2) It can be inferred from the legislative history (the preliminary Report of the House Merchant Marine and Fisheries Committee; is always relied upon, rather than more valid legislative history, that Congress "impliedly approved" the exclusive-

[37] Other than the Board's own cases.

patronage system because the preliminary Committee Report did not condemn it;[38] and

(3) It can be inferred from the Court decisions, involving the use of the system, remanding cases to the Board on the ground of *primary* jurisdiction, or from a case upholding the *Board's* decision *prohibiting* use of the system, that the Courts have by *implication* upheld the legality of the System, *sub rosa*, *dicta* footnotewise, or *sub silentio*.

Such far-fetched arguments can be quickly dispelled —if one were put to meet such twistings—as they were by the Court below. It is perhaps sufficient answer to these warped interpretations, deducted from latent sources, that this particular type of exclusive-patronage system was not in use when the Shipping Act of 1916 was enacted, and it was therefore impossible for Congress to give it any "implied approval" if such a method of legislating could ever stand up—any more than Congress would "impliedly approve" some other illegal practice or device that the Conference monopolies might subsequently concoct. In *Swayne* v. *Hoyt* v. *U. S.*, 300 U.S. 297, 307 (1936), this Court recognized that the exclusive-patronage contract system "does not differ substantially from [the] 'deferred rebate' [system] outlawed in both foreign and domestic coastwise shipping by § 14 of the Shipping Act." But even if, arguendo, the practice had been in use, we submit it has been con-

[38] The Brief of the Board is illustrative of these traditional arguments. It employs throughout such terms as the following: "impliedly approved" (p. 12), "free of any hint of disapproval" (pp. 12, 41); "implied Congressional endorsement" (p. 13), "impliedly approving" (p. 14).

demned by the clear words of the statute, which the Board chooses to ignore, and by the specific recommendations of the Congressional Committee which were before Congress. The Court below so found.

The Board's attitude in considering the illegality of this Conference practice has been that unless prohibited in *haec verba*, it must be legal "*per se*". Such an argument is an astonishing departure from the traditional interpretation of statutes involving an exemption from prior legislation, especially the Anti-Trust laws. The implication of legality claimed by the Board would confer upon the Conference, a private cartel—in this and *most* instances controlled by foreign citizens the absolute power to exclude any independent carrier—even an American citizen, as in this instance—from the trade, unless the independent joined the conference. It would, moreover, give these private polygopolists the absolute power to prevent *tramp*, contract, or private carrier operations in the Conference trade, because under the law such carriers cannot become parties to agreements under section 15 of the Shipping Act, since only agreements between "*common* carriers" and "other persons subject to the Act" can be approved by the Board thereunder. This extraordinary exclusionary practice, which the Board claims to be legal "by implication", would be the equivalent of giving to these private cartels the power to issue certificates of public convenience and necessity, with no statutory guide for their issuance.

Certainly, it is inconceivable that such a broad and destructive power would ever be put into the hands of private cartels, and it is absolutely unimaginable that

Congress would have granted such a power *by implication*. In the case of *Thomsen* v. *Cayser*, 243 U.S. 66 (1917), which arose before the enactment of the Shipping Act, 1916, this Court held that the exclusive-patronage *de*ferred-rebate system was in violation of Sections 1 and 2 of the Sherman Anti-Trust Act, 15 U.S.C. §§ 1, 2. Insofar as the Anti-Trust laws are concerned, there is no conceivable difference between the exclusive-patronage *de*ferred-rebate system and the instant exclusive-patronage *pre*ferred rebate system—it is merely the difference between a *de*ferred and *pre*ferred "*rebate*". The Board, at page 40 of its Brief, admits the essential similarity between the *de*ferred and *pre*ferred "*rebate*" systems. The case of *Thomsen* v. *Cayser, supra*, therefore—arising just before the passage of the Shipping Act—constitutes a clear-cut holding by this Court that exclusive-patronage systems of conference lines violate sections 1 and 2 of the Sherman Act.

Because the instant exclusive-patronage system, or any other similar to it, would violate the Sherman Act, it could only be lawful if it were capable of receiving an exemption from the Anti-Trust Laws. The Board, as we have stated, claims to have the authority to approve the system, under section 15 of the Shipping Act, and, thereby, to afford the system such an exemption as is provided under section 15. All of this it claims to be able to do by broadening the scope of permissible exemptions under section 15, and by avoiding the restrictive words of the statute, through its argument of "implied approval." Such an approach is directly contrary to all recognized authority considering statutory exemptions from the Sherman Act. Under fa-

miliar rules of statutory construction, it is well established that the creation of a specific exemption in a statute negatives any implication that other and broader exemptions were intended by the legislature. *Bend* v. *Hoyt*, 13 Peters 263, 271, 272 (1839); *Equitable Life Association* v. *Clements*, 140 U.S. 226 (1890). It is also a well established principle that courts do not favor repeals by implication. *United States* v. *Borden Co.*, 308 U.S. 188 (1939); *General Motors Acceptance Corp.* v. *United States*, 286 U.S. 49, 61, 62 (1931); *Henderson's Tobacco*, 11 Wall. (U.S.) 652, 657 (1871); *The State* v. *Stoll*, 17 Wall. (U.S.) 425 (1873); *Posadas* v. *National City Bank*, 296 U.S. 497, 503-505 (1936). Immunity from the application of the Sherman Act cannot be implied by reference to even general legislative policy or to asserted inconsistencies with other statutes, let alone discussions before legislative Committees, but must be expressly granted. *General Motors Acceptance Corp.* v. *United States*, *supra*; *United States* v. *Borden*, *supra*; *Henderson's Tobacco*, *supra*; *United States* v. *Tynen*, 11 Wall. (U.S.) 88, 92 (1871); *Posadas* v. *National City Bank*, *supra*; *United States* v. *Barnes*, 222 U.S. 513, 520, 521 (1911); *Baltimore Nat. Bank* v. *State Tax Commission*, 297 U.S. 209, 212, 213 (1936); *Frost* v. *Wenie*, 157 U.S. 46 (1894). This Court has uniformly applied such strict construction when considering statutory exemptions from the Sherman Act. The Capper-Volstead Act (7 U.S.C. §§ 291, 292) was so construed in *United States* v. *Borden Co.*, *supra*; the Webb-Pomerene Act (15 U.S.C. §§ 61, 62, 65) in *United States, Alkali Export Association* v. *United States*, 325 U.S. 196 (1944); the Transportation Act (49 U.S.C. §§ 71-78) in *United States* v. *South-*

ern Pacific Company, 259 U.S. 214 (1922); the Fishermen's Collective Marketing Act (15 U.S.C. §522) in *Hinton* v. *Columbia River Packers Ass'n*, 131 F. 2d 88 (C.A. Ore., 1942) and in *Manaka* v. *Monterey Sardine Industries*, 41 F. Supp. 531 (D.C. Cal., 1941); the Interstate Commerce Act (49 U.S.C. §1) and supplementary legislation in *Georgia* v. *Pennsylvania Railroad Company*, 324 U.S. 439 (1944).

A number of the above Acts, and other Acts pertaining to transportation (See the Bulwinkle Act, 49 U.S.C. §51, applying to common carrier railroads and Section 412 of the Civil Aeronautics Act, 49 U.S.C. §492, applying to common carrier air carriers) do provide for conference or similar joint-rate practice arrangements. But in none of these Acts has it ever been remotely suggested or contended that any exclusive-patronage arrangement was permissible. Under the three (3) steamship passenger conference agreements, approved by the Federal Maritime Board, it should be noted, there is no provision for any exclusive-patronage agreement, and no such system is used. *In short, the only form of transportation in which any attempt has ever been made to use the system is in ocean freight transportation.*

I. The Court Below Correctly Held That the Exclusive-Patronage System Is Unlawful Because It Violates Section 14, Third of the Shipping Act.

A. Section 14, Third Is Clear on Its Face.

Section 14, Third of the Shipping Act is abundantly clear on its face, as the Court below has found. The

only failure to understand its plain proscriptions, we submit, could arise solely from a refusal to believe that it means what it says. In this respect, from the time that the issue of legality under section 14, Third was first specifically considered by the Board in 1948 [see *Pacific Coast European Conference*, 3 U.S.M.C. 11 (1948)], the Board has refused to face up to the plain words of the statute, and on a variety of misconceived and inconsistent arguments has squirmed to avoid the unequivocal proscriptions.[39]

This statutory section, which it has been so difficult for the Board to grasp, provides as follows:

> "No common carrier by water shall, directly or indirectly, . . .
>
> "Retaliate against any shipper by refusing or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, *because such shipper has patronized any other carrier* or has filed a complaint charging unfair treatment, or for any other reason."

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[39] The Board and Conference Briefs attempt to advance the impression that the ruling of the Court below that the system was unlawful under section 14, Third of the Shipping Act came as a surprising blow to many Conference carriers, who might innocently be subject to statutory fines. There has certainly been no surprise to anyone who has followed the litigation. Since 1948 when the Department of Justice and Isbrandtsen directly attacked the legality of the system under section 14, Third and the Board rendered its decision in the *Pacific European* case, *supra*, the Board's decisions have been under continual litigation even though it has taken virtually a decade to surmount the obstacles repeatedly erected by the Board and the Conferences, in order to present a proper case for judicial review.

The various arguments of the Board and the Conference for avoiding the provisions of this section are inconsistent as well as unfounded—both Petitioners agree, however, that the section should be considered as meaningless. Their arguments are generally as follows:

(1) The Board argues that a literal reading of Section 14, Third could not be proper because it would make certain other sections of the Act, including the First and Second parts of the same Section, 14, surplusage (Bd. Br., 21);

(2) The Board also argues that "Mr. Webster" says that retaliation means "to repay or requite in kind, as an injury" (Bd. Br., p. 22) and that in this case, for unexplained reasons, retaliation means only "the refusal of space accommodations and related services necessary for the transport of goods" (Bd. Br., p. 23);

(3) The Conference argues that Section 14, Third does not apply to rates, because rates are not mentioned in the section;

(4) As a virtual appendage to its Brief, the Board advances what was once the major argument of both the Board and the Conference, *viz.*, that the words "unjustly" or "unfairly" should be assumed to qualify the word "discriminatory" in the section (Bd. Br., pp. 59, 60).

In a very real sense, these arguments of avoidance are hardly to be taken seriously. The Board, of course, understands the plain meaning of the section—it has only refused to apply it. At page 21 of its Brief, it

frankly admits that a literal reading of the section would make every exclusive-patronage system "unlawful and beyond the power of the Board to approve." We quite agree; that is what Congress enacted and what was intended to be the Law—it is the Board's function only to apply and to administer the statute, not to write its own legislation.

It is quite obvious that the basic purpose of Section 14, Third is to prevent direct or indirect retaliation by a common carrier or "resort to other discriminating methods" against a shipper because the shipper has done certain things which Congress felt he should have a right to do, namely,

(a) patronize another carrier, or

(b) file a complaint charging unfair treatment.

In addition, Congress imposed a further restraint upon the common carrier from using retaliatory or discriminatory methods against a shipper "for any other reason"—"other" than the two specified, as above.

The Board, in its deliberate process of searching for bogeymen, claims that the latter phrase makes the section meaningless, because a literal reading would enforce "a flat and unqualified prohibition of *any* discrimination by a carrier (sic.) for any reason." (Bd. Br., pp. 20, 21). Such an argument is only a deliberate attempt to avoid the purpose of the section, which is obviously to prevent *retaliatory* action or reprisals against a shipper because he had done something which he had a perfect right to do. Such "other reasons" might be, for example,

(1) because the shipper has testified against the carrier in Court; or

(2) because the shipper was unwilling to ship all of his goods to or from the ports the carrier might designate; or

(3) because the shipper was unwilling to purchase his merchandise from a company controlled by the carrier; or for a variety of other reasons including,

(4) as found by the Court below, because the shipper ~~has~~ refused "to enter into the exclusive-patronage arrangement" (R. 242).

The Board is intent on carrying its incomprehensible argument, concerning what it considers to be the rule of *ejusdem generis*, to the extreme of reading any meaning out of this statutory proscription. It is well settled that when the intent of Congress is plain, the scope of a statutory enactment cannot be narrowed or whittled away by rules of construction. *Newberger* v. *Commr. of Internal Revenue*, 311 U. S. 83, 89 (1940); *United States* v. *Gilliland*, 312 U. S. 86, 93 (1941); *Texas* v. *United States*, 292 U. S. 522 (1934).

There can hardly be any question concerning what type of action this statute is intended to prohibit. Only those intent upon avoiding it could conceivably raise a question of its meaning. Obviously, in the drafting of any statute Congress may not adequately, with complete exactness, define in every instance what was clearly intended. When the real purpose of the statutory enactment is plain, to those with some familiarity with the subject, especially the Courts, there is ordi-

narily no ambiguity in the statute, and the rule of *ejusdem generis* has little or no application. *United States* v. *Cohn*, 270 U. S. 339, 346 (1926). This Court set forth the proper purpose of the rule of *ejusdem generis* in *United States* v. *Gilliland*, *supra*, emphasizing that the rule cannot be applied for the purpose of "narrowing alternative provisions which the legislature has adopted with the purpose of affording added safeguards", as follows [at page 93]:

> "The rule of *ejusdem generis* is a familiar and useful one in interpreting words by the association in which they are found, but it gives no warrant for narrowing alternative provisions which the legislature has adopted with the purpose of affording added safeguards. 'The rule of "*ejusdem generis*" is applied as an aid in ascertaining the intention of the legislature, not to subvert it when ascertained.'" Texas v. United States, 292 U. S. 522, 534."

The Board argues that a literal reading of Section 14, Third would render as surplusage Section 14, First (prohibiting deferred rebates); Section 14, Fourth (prohibiting, *inter alia*, "unjust discrimination" based on volume of freight or in the matter of cargo space accommodations); Section 16, First (prohibiting the carrier, *inter alia*, from subjecting any person, locality etc. "to any undue or unreasonable prejudice or disadvantage in any respect whatsoever"); Section 16, Second (prohibiting transportation at less than regular charges by means of "false billing," etc., or "by any

other unjust device or means"); and Section 17 (prohibiting unjust discriminations) (Bd. Br., p. 21).

Such "surplusage" argument has absolutely no weight whatsoever, as even the Board seems to concede in the subsequent pages of its Brief (Bd. Br., pp. 22, 23). Sections 14 (Fourth), 16 (First), 16 (Second), and 17 prohibit certain proscribed actions that involve "unjust discrimination", "undue or unreasonable prejudice", "false billing", or "unjust device". Such proscriptions do not necessarily overlap the purview of Section 14, Third which is concerned with making an *absolute prohibition* against "discriminating or unfair methods" employed by a carrier in *retaliation* or reprisal against a shipper. The word "unjust" or "unreasonable" does not qualify the word "discriminating" in Section 14, Third because obviously Congress considered any retaliation or reprisal against a shipper to be unjust or unreasonable.

The Board admits that the statute can be read literally and reasonably, as the Court below has done (Bd. Br., p. 22), but the final and single objection of Board's Counsel, after their discussion is over, is that Section 14, Third would, when read literally and reasonably, also prohibit the use of the exclusive-patronage deferred rebate system which had already been outlawed by Section 14, First. Therefore, the Board argues that the reasonable and literal reading of Section 14, Third cannot be followed because

> "the Congress could not reasonably have enacted both Section 14, First, and Section 14, Third, as it is construed by the Court below" (Bd. Br., p. 23).

The above argument is preposterous. Congress has never been confronted with a shortage of words, and such a word-rationing program has never been followed. Alternative statutory provisions may often prohibit precisely the same type of conduct. See *United States* v. *Gilliland supra*. *There is no such rule of statutory construction that a statutory provision must be narrowed and limited because part of the conduct proscribed might be covered by some other section of the Act.* The Board itself admits in making this argument, that various actions could be prohibited by each of sections 14, 15, 16, and 17 of the Act. The practice before the Board reflects this overlapping of the statutory sections, and complaints are often brought before the Board alleging violations of sections 14, 16 and 17 of the Act, for instance, as well as including other statutory sections, all allegations covering the same action. See, for example, *Edmond Weil* v. *Italian Line*, 1 U.S.S.B.B. 395 (1935) [complaint based on sections 14, 14a, 15, 16, 17, and 18 of Act]. The Board, moreover, in numerous cases has found that the action so complained of violated several sections of the Act. See *Commonwealth of Mass.* v. *Columbian S. S. Co., Inc.*, 1 U.S.M.C. 711 (1938) [sections 15, 16, 17]; *Intercoastal Segregation Rules*, 1 U.S.M.C. 725 (1938) [sections 16 and 18]; *Practices, etc. of San Francisco Bay Area Terminals*, 2 U.S.M.C. 588 (1941) [sections 15, 16, 17]; *Rates from Japan to United States*, 2 U.S.M.C. 426 [sections 15, 16 First, 16 Second, and 17]. The terms "undue prejudice" in Section 16 of the Act and "unjust discrimination" in section 17 have often been used interchangeably and synonymously by the Board.

Philadelphia Ocean Traffic Bureau v. *Export S. S. Corp.*, 1 U.S.S.B.B. 538, 541 (1936); *H. Kramer* v. *Inland Waterways Corp.*, 1 U.S.M.C. 630, 633 (1937).

If the Board's argument about Congress never wasting words were sound, why did Congress provide in Section 15, that Conference agreements which were "unjustly discriminatory or unfair" should be disapproved and also condemn agreements otherwise found "to be in violation of [the Act]"? Certainly, the latter proscription would have been sufficient. Obviously, Congress has not conserved words in framing the Shipping Act—Congress has attempted to proscribe various unlawful practices and has set forth various statutory proscriptions in an effort to prohibit all deleterious practices brought to its attention and all others that might subsequently be devised.

The Board also argues that the definition of the word "retaliation" must be limited to the definition of the lexicographer, which it describes as

> "To return the like for: to repay or requite in kind, as an injury: to put or inflict in return (upon) . . ."

In its Report, the Board had defined the word retaliation as follows (R. 58):

> ". . . To retaliate is defined in Webster's New International Dictionary, 1945 Unabridged Edition, as 'to return like for like' or 'evil for evil'. Retaliation perhaps connotes the idea of vengeance . . . ."

Even if all emphasis were to be placed upon the word "retaliation", as so restricted, the Board's arguments are absurd. The carrier is unable to retaliate in kind, *viz.*, return "like for like" or an "eye for an eye", as the Board implies must be the case. If the shipper patronizes another carrier then there is no precisely simliar "like-for-like" act which the conference carrier could do as retaliation. Congress obviously must have meant something by retaliation other than returning "like for like". The Board, however, argues that the only retaliatory action condemned is the denial of space accommodations to the shipper, thus, by this device, rendering practically all of section 14, Third not only surplusage but nonsense, because the same acts have been prohibited by Section 14, Fourth. The Court of Appeals thoroughly considered these perverted arguments of the Board. Judge Washington, in his concurring opinion, in which Judges Prettyman and Fahy concurred, stated:

> "The crucial question on this appeal is of course whether Section 14, Third, of the Shipping Act of 1916 proscribes the type of contract here involved.
>
> "In the first place, it seems clear that in actual practice the contract system is being used to penalize a shipper because he has patronized another carrier, *or* at least *reserved the right to do so.* Is that 'retaliation,' proscribed by the Act? Certainly there seems no reason to limit 'retaliation' to the dictionary definition of 'returning like for like' or 'evil for evil,' which have been selected by the Board. The very example used by the

statute, boycotting for use of another carrier, is not 'like for like' nor are the boycotting carrier or group of carriers necessarily imbued with ideas of doing evil. But detriment to the independent shipper and the independent carrier plainly results.

"Are these contracts, then, the sort of 'discriminating or unfair methods' that the statute sought to anticipate? That the contract system comes within the literal meaning of this phrase is clear. As the Supreme Court observed in *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297, 303 (1937), a contract system under which different prices are charged for the same transportation of identical cargoes to identical ports under identical circumstances is 'prima facie discriminatory.' Nevertheless, the Board urges that the literal meaning of the statute should not be followed." (R. 246, 247). [footnotes omitted]

It is difficult to imagine a clearer case of "discriminating or unfair methods" against a shipper because such shipper has patronized another carrier than the exclusive-patronage system.

The Board is speaking with no relation to reality when it states that the Conference is retaliating against the shipper who will not give his exclusive patronage to the Conference solely "because the shipper does not sign the contract". (R. 58). The Board refuses to look at the real purpose of the contract which is to prevent the patronizing of any non-conference carrier. Under the Board's interpretation, the prohibition against retaliation would be meaningless and without

any force whatsoever, because the carrier would always be able to avoid this prohibition by the mere device of holding out any sort of exclusive patronage contract to the shipper, which would prohibit him from patronizing other carriers; thereby enabling the carrier to contend that the unlawful retaliation was *only because the shipper did not sign the contract.*

Neither the Board nor the Conference could scarcely be serious in suggesting that the Conference regards the mere signing of the exclusive-patronage contract as determinative. Of course, the Conference members are not interested in a mere paper transaction—they are concerned only in obtaining all of the shippers' business, and preventing shippers from patronizing their non-conference competitors.

The exclusive-patronage system "retaliates" or "resort[s] to other discriminating or unfair methods" against shippers in at least two obvious respects: First, it discriminates against the shipper, who would choose to maintain his independence of choice to patronize a non-conference line, by exacting from him the higher non-contract rate; and secondly, it discriminates against the "contract shipper" (who has signed an exclusive-patronage contract) for his act of employing a non-conference carrier, by imposing severe penalties upon him. Both of these "retaliations" or "discriminating or unfair methods" are imposed precisely because "such shipper has patronized [another] . . . carrier," which are the very words of the prohibition in section 14, Third.

Neither the Conference nor the Board has even undertaken to answer the second "retaliatory" or "discriminatory or unfair" feature of the system, *viz.*, the

penalty imposed on the "*contract* shipper" for patronizing an independent carrier. This retaliation is most invidious when it is realized that the "contract shipper" is economically coerced into signing the exclusive-patronage contract—as the Board's Report admits (R. 35)—and when it is realized that the threat of this severe penalty would tie the "merchants to a group of lines" in perpetuity.

Even if it were determined that the Conference carriers "retaliate" or "resort to discriminating or unfair methods" against the non-contract shipper only because he would not sign the exclusive-patronage contract and not because "such shipper has patronized any other carrier", such arbitrary and unfair discriminatory action is still prohibited by the proscription that the Conference lines *as common carriers* cannot so discriminate for "any other reason". The Court below, thus, has not relied on any precise technical distinction as to why the retaliation has occurred, for it is largely unimportant. In this respect the Court held:

> "Section 14, Third, applied not only to retaliation for shipping by another carrier but for 'any other reason', *which would include failure to enter into the exclusive contract arrangements.*" (R. 242).

Thus common carriers cannot practice *such retaliatory acts for any reason*, whether it be that they might not like the color of the shipper's hair, his religion, or because he has refused to sign the exclusive-patronage contract.[40]

[40] Certainly the burden so placed upon carriers to refrain from such retaliatory actions is not undue, although the Board at pages 19 and 20 of its Brief apparently suggests that it is.

The argument of the Conference that Section 14, Third does not apply to any "rate practices" (Conf. Br., p. 33) would be equally destructive of the purpose of the section, which, of course, is the Board and Conference intention. There is no authority cited by the Conference that this section does *not* apply to rate practices, and certainly none could be found. A shipper can be just as effectively denied space accommodations by means of a rate practice as by a flat refusal to accept his cargo. For example, if the shipper's competitors are paying a rate of $40 per ton and the carrier seeks to charge him $100 per ton, then he is effectively denied cargo space accommodations because he cannot ship at the higher rate and stay in business. The Board's Brief, it may be noted, is inconsistent with the Conference approach, for the Board admits on page 21 of its Brief that a literal reading of Section 14, Third would obviously make the section applicable to rate practices.

The Conference argues elsewhere in its Brief (page 23) that the charging of a higher rate to a non-contract shipper "is not retaliatory *per se*", whatever that may mean. Thereafter, some concocted and wholly unfounded principles are set forth by the Conference for determining whether there is "retaliation *per se*" as follows (Conf. Br., p. 23):

> "If the less advantageous treatment of a non-contractor is reasonably necessary in the conduct of the vendor's business or in the public interest and no motive of inflicting injury is present, no retaliation exists."

Of course, no authority has been cited for such a fanciful test. Congress has not inserted any test of "motive" into the statute; if the *result* is retaliation or discrimination, because the shipper has done something which he has a perfect right to do, then a violation of the Act has occurred.

As an inconsistent appendage to its Brief, not even in the same section where it discusses the literal reading of Section 14, Third (*viz.*, pp. 19-25), the Board hangs on to the last vestige of what was once its main argument [See *Pacific Coast European Conference*, 3 U. S. M. C. 11 (1948); *Isbrandtsen v. North Atlantic Conference*, 3 F. M. B. 235 (1950)], that the word "discriminating" in the section must be assumed to be modified by the qualifying adjectives "unjustly" or "unfairly" (Bd. Br., pp. 59, 60). The argument is, of course, wholly inconsistent with the Board's previous arguments concerning the interpretation of Section 14, Third, and it is significant that *Conference* Counsel, who once strenuously advocated such an argument, have now seen fit to drop it.

The absurdity of this argument of the Board is perhaps best illustrated by the Board's summary of it, appearing at pages 59 and 60 of the Board's Brief, as follows:

> "Upon this *slender thread*—the omission of the *routine word* 'unjustly' or 'unfairly' in front of the word 'discriminatory' (sic.)—depends the reasoning of the Court below . . ."

The "slender thread" and the "omission of the routine word" involves the central purpose of Section 14,

Third, as both the Board and the Conference seem to recognize elsewhere in their Briefs, Congress, manifestly, considered that any retaliatory or discriminating action taken against a shipper, *because the shipper had done something* which he had a perfect right to do, should be unlawful without more. There could be no question that the so-called "routine words" "unjustly" or "unfairly" were *deliberately* omitted by Congress.

It is indeed surprising that the Board could elsewhere in its Brief argue that Congress could never be supposed to have indulged in word wasting to the extent of passing two statutory sections that might prohibit the same thing, and later argue that Congress was so inattentive and casual as to have omitted unintentionally two words which would have changed the entire meaning of a statutory section.

Resort to the legislative history, we believe, to establish such an *obvious* point is improper. But, nevertheless, if such legislative history is explored, the deliberateness of Congress in omitting the "routine words" is clear beyond any doubt. The Initial Report of the House Merchant Marine and Fisheries Committee, H.R. Doc. 805, 63rd Cong., 2d Sess., made certain recommendations to Congress with respect to retaliation. For example, the Report stated at page 421 that:

> "all carriers should be prohibited from retaliating against any shipper by refusing space accommodations when such are available, or by resorting to other *unfair methods of discrimination*, because such shipper has patronized an independent line, or has filed a complaint charging unfair treatment, or for any other reason."

In the section that became 14, Third, however, *neither* the shipping bill, introduced in the 63rd Congress (H.R. 17328),[41] *nor* the bill introduced into the 64th Congress, First Session (H.R. 15455, which became the Shipping Act; See H.R. Report No. 659, 64th Congress accompanying the Final Bill), followed the precise language of the original Committee Report. Instead, both bills changed the phrase "by resorting to other unfair methods of discrimination" to read, "or by resort to other discriminating or unfair methods". The two phrases are basically different, because the former conveys the concept that some discrimination, when justified, might be allowed, whereas, the latter contains an absolute prohibition against any discrimination of the type described. It is certainly audacious for the Board to suggest (Bd. Br., p. 61) that this major change in language was made inadvertently by Congress. It is obvious that when the actual drafters of the shipping bills disregarded the language in the original Committee Report, they consciously intended to proscribe any discrimination to any extent rather than qualified discrimination as had been first suggested in the preliminary Report.

B. The Legislative History Offers No Support to Petitioners.

Isbrandtsen contends that resort to legislative history in this instance, to determine the meaning of rele-

[41] Section 2(3) of H.R. 17328, 63rd Cong., 2d Sess. provided "that no common carrier by water shall . . . retaliate against any shipper . . . or resort to other discriminating or unfair methods, because such shipper has patronized any other carriers or has filed a complaint charging unfair treatment, or for any other reason."

vant sections of the Shipping Act, involved herein, is neither necessary nor appropriate. Mr. Justice Jackson expressed the following principle in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 395, (1951) which would completely invalidate the argument of the present Petitioners on their presentation of the "legislative history," so called:

> "Resort to legislative history is only justified where the face of the Act is inescapably ambiguous. . . ."

The Board's consistent concern with what Congress meant, instead of attempting to apply the clear words of the statute, is, we submit, fundamentally improper. As expressed by a former Chief Justice, an administrative agency should "not inquire what the legislative meant; [it should] ask only what the statute means." Holmes, *Collected Legal Papers*, (1920).

The "legislative history" which Petitioners have traditionally relied upon, and which they now rely upon, to sustain their arguments is largely a summary merely of the testimony and arguments that were presented to the Congressional Committee at the hearings, practically all of which presentation was the self-serving statements of conference witnesses. It is exceedingly doubtful whether the portions of such "legislative history" relied upon by Petitioners were ever directly before Congress when the legislation was considered and enacted. The Petitioners have avoided assiduously, moreover, any discussion of the actual recommendations which the Committee made in the Report (H. R. Rep. No. 659, 64th Cong., 2nd Sess.), *in 1916*, which accompanied the final Shipping Bill (H. R.

15453, 64th Cong., 1st Sess). Even the arguments that are presented by Petitioners, however, are without the flimsiest support in the "legislative history" *of 1914* to which they resort.

The legislative proceedings preceding the enactment of the Shipping Act are divided into two phases:

First, the United States House of Representatives on February 24, 1912 and June 18, 1912 adopted resolutions directing the Committee on Merchant Marine and Fisheries to conduct an investigation of steamship conferences. That Committee, under the Chairmanship of Hon. Joshua W. Alexander of Missouri, gathered data and testimony over a period of nearly two years. The records of the proceedings were published in four volumes and constitute the preliminary report of the Committee.[42]

Secondly, after the printing of the initial Alexander Committee Report, in 1914, several bills were introduced and extensive hearings were held in both the House and the Senate.

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[42] Investigation of Shipping Combinations, H. R. Doc. 805, 63d Cong., 2d Sess. (1914). Page references given hereinafter in this section refer to that document. While in the Briefs of the Board and the Conference, herein, and generally throughout the years this publication has been referred to as a "Report", it is, in fact not correctly called a Report, as that term is used in connection with Congressional publications. A "*Report*" accompanies legislation, which was before the Committee, and on which some action has been taken. This publication, being a "document" (*viz.*, H. R. Doc. 805) clearly indicates, and it is obvious from its contents, that it was not issued or published in connection with any legislation *then pending before that Committee*, but it is an account of the hearings and proceedings before the Committee, in the conduct of its investigation, rather than any consideration of particular legislation, although at the very end of the document, the Committee set forth approximately nine pages of certain "recommendations"

The Board and the Conference rely entirely on a distortion of this 1914 initial Report of the Alexander Committee (Bd. Br., p. 33; Conf. Br. p. 27). Even this initial Report, however, lends no support to Petitioners. An account of the proceedings before the Committee is published in four volumes; more than three and one-half of the volumes are devoted to summarizing the evidence and testimony received, and the end of the fourth volume contains a digest of the *arguments* presented to the Committee, together with the Committee's recommendations for legislation. It is important to recognize the actual status of this preliminary Report of the Alexander Committee, because *the portions relied upon by the Petitioners are actually nothing more than a summary of arguments which had been made to the Committee at the hearings.* Most of the arguments, of course, were made by the conferences themselves and their member lines. If such self-serving arguments made to a Congressional Committee could ever have a proper standing in the "legislative history" of an Act, it would certainly be held remote at best, and could hardly be considered determinative in interpreting the plain and unequivocal language of the statute.

But even in such "legislative history" of the Act, it is precisely clear that Congress intended to preserve independent competition and to prevent discriminations by conference lines against shippers.[43] Conferences

[43] The legitimate purpose of any conference agreement cannot extend beyond the "controlling, regulating, preventing, or destroying" of competition as among the conference members themselves. The suggestion in the Board and Conference Briefs that these words

were allowed to exist, pursuant to section 15 of the Act, only as a matter of privilege, not of right, and their activities were intended to be subject to the closest scrutiny and to all statutory proscriptions in the Act. Congress clearly prohibited in principle the exclusive-patronage system, which has the primary purpose of eliminating and suppressing *independent* competition. In this respect, it specifically prohibited all such exclusive tying arrangements or unfair monopolistic practices *then in use* by conferences—and the only reason that the present type of exclusive-patronage system was not specifically condemned was that it was not then in use. *But even if the system had been in use, the Board and Conference would have nothing to rely upon.* The present exclusive-patronage system is similar in all essential respects to the specifically outlawed exclusive-patronage-deferred-rebate system which *was* then in use.

In *Swayne & Hoyt* v. *United States*, 300 U.S. 297, 306, 307 (1937), this Court stated that,

> "As the Secretary has interpreted the evidence, the operation of the contract system [exclusive-patronage system], in the circumstances of this

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may contemplate the permissible destruction of non-conference competition by the Conference members is an absurdity. The entire legislative policy of the Shipping Act is contrary to such an approach—it is intended to preserve competition and to prevent discriminations and unfair practices. Even if the general legislative policy were in accord with the Board's approach, which it clearly is not, immunity for the exclusive-patronage system from the application of the Sherman Anti-Trust Act could not be implied by reference to general legislative policy, or to asserted inconsistencies in the statute, but would have to be expressly granted (See *supra*, p. 91).

case, does not differ substantially from that of 'deferred rebates' outlawed in both foreign and coastwise shipping by Section 14 of the Shipping Act."

1. *The Initial Report of the Alexander Committee is Contrary to Petitioners' Contentions*

As stated above, the first three volumes of the Initial Report of the Alexander Committee and more than one-half of the fourth constitute merely a summary of the testimony and contentions of the witnesses (See 53 Cong. Rec, 8095). The latter part of the fourth volume contains a summary of the arguments which were presented to the Committee.[44] This preliminary or initial Report of the Alexander Committee does not contain any proposed draft of legislation for a shipping bill.

The Committee had made certain recommendations at the end of this preliminary Report, which have been traditionally ignored by the Board and the Conference.[45] The Committee expressed concern over various unfair methods then used by conference lines "to meet the competition of non-conference lines" (p. 417). There is contained in these specific recommendations not the slightest hint that the Committee approved any exclusive-patronage arrangements with shippers, whether the rebate involved be *de*ferred or *pre*ferred.

[44] Volume 4 contains 424 pages, and the Summary begins at page 281 and continues through page 415.

[45] These specific recommendations comprise nine pages out of about two thousand pages in the four volumes and they are the only recommendations of the Committee in its Report.

as is the case of the present substitute for the deferred rebate system. In this respect, the Committee, in fact expressly condemned such practices, in the following explicit recommendation for legislation (p. 421):

> "*That rebating of freight rates to shippers be made illegal;* and that; with due regard to the proper loading of the vessel and the tonnage available, *discrimination* between shippers, or ports in the matter of rates and space accommodations be prohibited. In this connection it is the belief of the committee that water carriers should be required to charge equal rates to all shippers irrespective of the volume of freight offered for shipment."

This is an actual recommendation of the Committee not arguments presented to it. In the face of its specific recommendation that "rebating of freight rates to shippers be made illegal," how could the Committee have given any "implied congressional endorsement" to the exclusive-patronage system now before this Court, as the Board's Brief suggests (Bd. Br., p. 12)? The suggestion is preposterous on two counts: first, the system was not then in use, as we shall prove below and as the Court of Appeals has already found; and, secondly, the language relied on by the Board for such "implied approval" was merely an *argument* made to the Committee.

The Court of Appeals below has specifically rejected this "implied approval" argument of the Board and the Conference. Judge Washington, in dismissing this argument, stated:

"Were the premise sound, the argument would have some merit. But the fact is that contracts examined by the Alexander Committee were materially different from the contracts before us now." (R. 251).

Shortly before the Alexander Committee's investigation, the conferences had become concerned over the illegality of the deferred-rebate system, and such rebates were abandoned in some trades, especially in the export trades of the United States (p. 288). Apparently, as the deferred rebate system was abandoned, the system was replaced by simple contracts of carriage, specimens of which are contained in Volume One of the Committee's Report (pp. 97, 248, 249, 251, 258). These contracts were not at all like the deferred-rebate system, or its modern counterpart, the *pre*ferred-rebate system. The limited contracts of carriage before the Alexander Committee were fully described in the opinion of Judge Washington, and by the Court below as follows:

"The 1913 contracts were bona fide requirements contracts. The sellers (carriers) undertook a firm obligation to provide space; both parties undertook firm obligations as to the price. And since the price was fixed for the term of the contract (usually 6 months), the price figure in the contract represented a hedge on the part of both parties against fluctuations in rates. In the contracts in suit the carriers' commitments as to space is almost illusory, being a commitment to carry "so far as regular services are available." The price aspect

> of the contract is in terms subject to increases. Thus, the two principal considerations normally given to a buyer (the shipper) under a requirements contract—guarantee of supply and guarantee of no rate increase—are lacking. In their stead are two essentially penal provisions—the higher rate and the liquidated damage clause—both imposed to coerce shippers to refrain from using non-Conference carriers. These differences are dispositive of the Board's principal argument. Implied Congressional approval of a bona fide requirements contract is no basis for exempting the contracts in this case from the plain meaning of "discriminating or unfair methods." They must therefore be condemned." (R. 247, 248).

It was apparently *argued* to the Committee that these "requirements" contracts were not as objectionable as the deferred-rebate system.[16] Herein lies the key to the Board's distortion of the Committee Report and to its erroneous repetition of the argument in a footnote by this Court in the *Swayne & Hoyt* case. Under the heading "Advantages of Shipping Conferences and Agreements in the American Foreign Trade" (p. 295), the Alexander Committee Report summarized various *arguments* made to it. The summary was not represented as the *Committee's* views, and, in fact, it is specifically stated in a footnote that:

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[16] Even as to these "requirements" contracts there is is not even the slightest hint of approbation by the Committee.

"This summary represents the views of leading exporting and importing firms operating at our most important ports." (p. 295).

It is emphasized throughout that these were the *arguments* "presented to the Committee" (*Ibid.*).

In a similar fashion, the Committee summarized the "Disadvantages of Shipping Conferences and Agreements, as Now Conducted" (p. 304). One of the objections listed, concerned the deferred-rebate system, which was argued to be objectionable because it tied "the merchant to a group of lines for successive periods." (p. 307). The Committee went on in its summary of this argument to state that:

> "In this connection, *it is argued* that the ordinary contract system does not place the shipper in the position of continual dependence that results from the deferred rebate system." (p. 307).

The Board repeatedly throughout its Brief—as it did in the Court below—undertakes the deliberate deception, of omitting from the above quotation, the words "*it is argued*" (Bd. Br., pp. 12, 13, 40, 41). It is astounding that any administrative agency would indulge in such palpable attempts to pervert language in a Committee Report by omitting words, which omission changes the intention of the statements therein contained. As an example of such deception, repeated throughout the Board's Brief, it is stated on page 21 thereof:

> "Unlike the deferred rebate system, *said the Committee*, 'the ordinary contract system does not

place the shipper in the position of continual dependence that results from the deferred rebate system'."

The Committee, of course, *said no such thing*. In a summary of the testimony offered, the Committee had merely summarized the testimony of certain *conference* witnesses, as quoted above, and had preceded the statement referred to by the Board with the words, "In this connection, *it is argued* . . .".[47]

There can be no doubt that this language from the Alexander Report was not a recommendation of the Committee, but merely a summary of an *argument* made to it. Even if the Committee had been referring to the exclusive-patronage *pre*ferred-rebate system (which it was not, because that system was not then in use), the language could not possibly constitute an "endorsement" of such system.

2. *The Present Type of Exclusive-Patronage System was Never before the Alexander Committee*

Even if the present exclusive-patronage *pre*ferred rebate system had been before the Alexander Committee, in 1914, all of the legal argument against the validity of the system would still have to be met. The only essential difference between the *de*ferred-rebate system described by the Alexander Committee (p. 287) and the present *pre*ferred-rebate system is merely the differ-

[47] The Board itself, when not represented by its ardent regular and "Special" counsel, has been considerably more honest in describing the quotation referred to. The Board, in its Report, cites the full quotation and frankly states that it "represents the testimony of witnesses before the committee" (R. 51).

ence between a *de*ferred and a *pre*ferred rebate. Obviously, neither the Committee nor Congress would have been so naive as to condemn the former and approve the latter, at least without considerable discussion.

Until the recent unfounded assertions by the Board that the Alexander Committee gave its "implied approval" to the exclusive-patronage system (Bd. Br., p. 14), it has generally been recognized, however, that the system was *not employed* in American commerce until several years after the passage of the 1916 Act. A memorandum before the Board, dated June 16, 1926, in a proceeding known as *Ex Parte 5, Contract Rate Investigation* (subsequently dismissed on March 3, 1927, and strangely not reported) states that the exclusive-patronage-contract system was first used, in 1922, in the North Atlantic United Kingdom Freight Conference Trade, in connection only with the carriage of automobile tires. The author of this memorandum was the Chief of the Board's Bureau of Regulation and it is in the "official records" of the Board.[48] The Board's Regulation Chief, the officer normally charged with the duty to advise the Board on such matters, was obviously in a far better position, in 1926, to determine when the system was first used than the Board's present Counsel are today.

If it were true that the exclusive-patronage *pre*ferred-rebate system, as well as the *de*ferred-rebate

[48] Isbrandtsen's counsel obtained access to the above memorandum by inspecting the minutes of the Shipping Board of March 3, 1927, which are public and may be inspected by interested parties pursuant to Rule 11(e) of the Board's Rules of Practice and Procedure.

system, were in existence in 1914, during the investigation and hearings of the Alexander Committee, it is certainly very strange that there was a long hiatus after the passage of the Act, in 1916, before the system was put into effect by Conferences serving the United States and subject to section 15 of the Shipping Act.

According to the records of the Board, *furnished by the 62 conferences presently employing the exclusive-patronage preferred rebate system*, the first use of it was begun in *1923* by the North Atlantic United Kingdom Conference (now F.M.B. Agreement No. 7100) and it was applied only to *one* item, *viz.*, "automobile tires." This information supplied by the Conference conforms roughly to the facts found by the staff of the Shipping Board, in 1926, in *Ex Parte 5, Contract Rate Investigation, supra.*

Also according to these records of the Board, *furnished by the Conferences using the system*, only eight (8) other conferences initiated the system in the 1920's, viz., two (2) in 1924, two (2) in 1925, three (3) in 1927, and one (1) in 1929.

In the 1930's, thirty-four (34) Conferences started to use the system, and the balance initiated it thereafter, eleven (11) as late as 1946 and 1948. Two of the Conferences so reporting did not indicate when they first employed the system.

When the system was first concocted, *some six or seven years after the passage of the Shipping Act*, it was generally applied only to a limited number of commodities, often only one, as in the case of the North Atlantic United Kingdom Conference. In the case of the instant Japan-Atlantic and Gulf Freight Confer-

ence, its predecessor conference first used the system starting on December 31, 1928, when it was applied to only three (3) commodities, *viz.*,

"canned crabs, lily bulbs, and tea". (See R. 24)

This and other conferences have come a long way since these modest beginnings and would now assert the complete monopolistic power to apply the predatory system to "all shipments" (R. 35).

The Board's Counsel should certainly attempt to conform their extreme statements to what a simple examination of their own records would reveal. It is absolutely without foundation that they declare, on page 18 of the Board's Brief, that:

> "For 40 years the evils condemned by the Congress in 1916 have been suppressed under the Act, while the needs of ocean shipping recognized by the Congress have been preserved. For 40 years the dual rate system, now in use by 62 conferences dealing with the foreign trade of the United States, has been a cornerstone in the stability of rates and services in ocean shipping."

These statements of the Board are flatly untrue, and Isbrandtsen believes that it is fundamentally improper that it should be confronted with such outrageous factual distortions by representatives of an agency, which enters the case as an active partisan and apparently seeks to further a delusion that the general, unfounded, and incorrect assertions in its Brief are the product of administrative "expertise".

Likewise the indispensability of the system to the continuance of a conference, and the prevention of its

"dissolution", as portended by Conference Counsel herein, is subject to the same characterization, as being unfounded and untrue. In its Report, the Board states,

> "It is inconceivable that Congress in selecting a regulated conference system in preference to unregulated cutthroat competition, would have outlawed a system which in many cases is the sole method by which a conference may retain a sufficient amount of cargo to assure its continued existence. (R. 59, 60)".

Mathematical proof of the inaccuracy of such claim of indispensability and prediction of dissolution is found in the Board's records, in that, of the 125 freight conferences authorized, 63 have well "survived" without using the system. Furthermore, all conferences survived for many years after the passage of the Shipping Act without employing the system.

3. *Subsequent Legislative History After the Initial Report of the Alexander Committee Makes it Clear that any Exclusive-Patronage System is Illegal.*

After the printing of the initial Alexander Committee Report in 1914, Congress was not inactive with respect to shipping legislation. H. R. 17328 (the original shipping bill) was introduced on January 29, 1915, and hearings were held from February 10 to March 9, 1915 (53 Cong. Rec. 8074). Additional hearings were held between April 13 and 22, 1915. Various other shipping bills were introduced and considered: H. R. 18518, 63rd Cong.; H. R. 3728, 63rd Cong.; H.R. 450, 64th Cong.; H.R. 10500, 64th Cong.; H.R. 14337, 64th Cong.; H.R.

15455, 64th Cong.; H.R. 15565, 64th Cong.

Hearings were also held on H.R. 14337 before the House Committee between April 13 and 22, 1916. H.R. 15455 was the bill that eventually passed, and it was extensively debated in the House and in the Senate, where it was substantially amended. In this entire legislative history of the actual drafting of the Act there is not one single mention of any exclusive-patronage-contract system other than the deferred-rebate system.

Representative Saunders of Virginia, in explaining, on the floor of the House, the regulatory proscriptions of what is now section 14 of the Act, had no difficulty in expressing its clear meaning, which would condemn the present system (53 Cong. Rec. 8105):

> "What is the rest of that section? Not only are deferred rebates eliminated, not only are 'fighting ships' prohibited, but a carrier is forbidden to *retaliate against any shipper who refuses to use that particular line in the shipment of his freight.* Do you think that a carrier ought to be allowed to put a black mark against you, or retaliate against you, when you make your choice of another line, or ship to carry your freight?"

Senator Cummins, on the floor of the Senate, expressed great concern that *ordinary rebates "just as obnoxious to common sense and good reason" as deferred rebates might be permitted* (53 Cong. Rec. 12449). Senator Fletcher explained that such a result would not occur and quoted the remarks of Dr. Johnson, a drafter of the bill, before the House Committee on H. R. 14337.

In other words, there was a frank recognition that Congress itself could not, in specific terms, conceivably outlaw in advance all possible methods of destroying outside competition which might be devised. It trusted to the alertness of the Board and the Courts to condemn subsequent "unfair" practices which might be invented for evading the statute.

II. The Decision of the Court of Appeals Is Not in Conflict With Any Prior Decision of Any Court

Perhaps the most remarkable of the various misconceived contentions of the Petitioners are those relating to prior decisions of this and other Courts, concerning the exclusive-patronage system. Both the Board and the Conference rest their arguments on an outright perversion of what the cases have decided. Petitioners' Briefs, in this connection, both cite the same cases upon which they base their conclusions that court decisions have held "that the system is not illegal *per se*" (Bd. Br., pp. 62-69), and that "the decision below *appears* to be inconsistent with prior decisions of this Court" (Conf. Br., pp. 50-66).

Except in briefs, filed by Petitioners with the Courts, it has generally been conceded, and it is obvious from the cases, that until the decision of the Court below, there had been no definitive judicial decision on the legality or illegality of the exclusive-patronage system under the Shipping Act. For example, Chairman Clarence G. Morse of the Board frankly conceded, in his testimony before the House Merchant Marine and Fisheries Committee, on February 7, 1957 (six days after the Board's Petition herein was filed with this

Court), that until the decision of the Court below, none of the cases, involving the exclusive-patronage system that had gone to court, had been productive of any "definitive answer" concerning the legality or illegality of the system. In that testimony, the Board's Chairman engaged in the following colloquy with Representative Allen of California:

> Mr. Morse: ". . . Now, for the information of some of the members of the committee, a dual rate system is nothing more or less than an exclusive patronage contract under which a given shipper contracts with the conference that he will ship all of his shipments moving in foreign trade on vessels of the member lines of the conference. For many years the Board has consistently ruled that the dual system is lawful under the 1916 Act. The question has been raised in several court cases and in none of them with a definitive answer, in my personal opinion, but as a result of this ruling of the Board in the Japan-Atlantic conference, the matter went to the Federal Court of Appeals here in Washington and it was ruled that the system was unlawful per se.[49] Applications for certiorari to the Supreme Court were filed just last Friday, I believe, and if the Supreme Court grants the writ of certiorari, which I hope it will do, the matter will be finally determined by the Supreme Court as to whether the system is or is not lawful.
>
> Mr. Allen: "In other words, then, the courts have

[49] The decision referred to is the decision of the Court below herein.

ruled that the opinion held by Maritime over the years was not in accordance with law?

Mr. Morse: "Some courts have so held. There has been intimation by an earlier Supreme Court that the system was not unlawful per se. It was purely dictum by the Supreme Court in that early case." [30]

In agreement with the Chairman, the Board's "Special Counsel", Mr. Gardner, also regular attorney for one of the Petitioners, in a letter to the Clerk of this Court, dated October 2, 1957, requesting additional time for oral argument, states that the issues involved in the exclusive-patronage system have engaged the Board in Court cases for many years "*without yet having produced a definitive result*".

This Court will undoubtedly be surprised at Petitioner's contentions that it has previously held the exclusive-patronage system lawful, by implication, not only through a footnote in a case not involving this issue, but also through its action of remanding cases to the Board on the ground that the Board had primary jurisdiction, or because there were procedural deficiencies. The previous decisions of this Court involving the exclusive-patronage system have either involved a denial of *certiorari*, where the Court below had held

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[30] The case referred to by the Board's Chairman is *Swayne & Hoyt v. United States*, 300 U. S. 297 (1937), which is discussed *infra*, pp. 132 to 137. This language appearing in a footnote in the *Swayne & Hoyt* case to which Mr. Morse refers as "purely dictum" is cited and quoted in the Board's Brief on pages 64 and 65 as a "holding". The case is also discussed in the same terms in the Conference Brief at pages 60 through 62, as follows (p. 62):

> "We urge that this footnote constitutes a holding that dual-rate systems are not illegal under § 14, Third."

that the system involved an "agreement" between carriers, *Isbrandtsen Company* v. *United States*, 211 F.2d 51, Cert. denied sub nom., *Japan-Atlantic & Gulf Freight Conference* v. *United States*, 347 U.S. 990 (1954); or a refusal to consider the question of legality on the ground that the Board had primary jurisdiction to consider the facts, *U. S. Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474 (1931); *Far East Conference* v. *United States*, 342 U.S. 570 (1951); or a refusal to consider the question of legality on the ground that the Board had *not* made proper findings of fact to support even its own reasoning, *A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Company*, 342 U.S. 950 (1952); or an affirmance of a decision of the Maritime Agency holding that the use of the system was not justified. *Swayne & Hoyt* v. *United States*, 300 U.S. 297 (1936).

Neither the arguments of the Board nor the arguments of the Conference concerning the alleged legality of the exclusive-patronage system have ever prevailed in any case before this or any other Court. The Courts have refused to decide the issues of illegality heretofore raised by opponents of the system, primarily because of the Board's own procedural deficiencies and because of the Board's failure to exercise its primary jurisdiction. The Board's only success in these cases has been merely to have the cases remanded to it, a result it has consistently striven to accomplish.

(1) In *Isbrandtsen Company* v. *United States*, 81 F. Supp. 544 (S.D. N.Y., 1948), an injunction was granted to Isbrandtsen restraining a Board order purporting to allow the Eastbound and Westbound North

Atlantic Continental Conferences to institute the system. The injunction was conditioned upon Isbrandtsen's prosecution before the Board of a complaint. An appeal by the Conference and the Board to this Court was dismissed sub nom. *A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Company*, 336 U. S. 941 (1949).

(2) After the above decisions in that *North Atlantic Continental* case, Isbrandtsen prosecuted its complaint before the Board, which dismissed the Complaint and permitted the use of the System. Isbrandtsen thereupon appealed that decision, or contested it, before the Statutory Court, where the original complaint was still pending, and the Statutory Court held that the Board order dismissing the complaint of Isbrandtsen in that case was invalid because the differential between contract and non-contract rates was obviously arbitrary and therefore unjustly discriminatory. The Court specifically declined to decide the issue of legality in this case because of the obvious failure of the Board to make the necessary basic, pivotal, or constitutive findings to support even its own reasoning. The Board—retaining "Special Counsel" to argue before this Court, as in this case—and the Conference appealed that Statutory Court decision directly to this Court, which, by an equally divided court, affirmed the decision of the Statutory Court, *A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Company*, 342 U.S. 950 (1952).

(3) In *Far East Conference* v. *United States*, 342 U. S. 570 (1951) this Court reversed a decision of the New Jersey District Court which refused to dismiss a complaint filed by the Department of Justice against the use of the system, based upon an alleged violation of the Anti-Trust Laws, the sole ground of this Court's

reversal being that the Board had primary jurisdiction. The Board and Conferences have tried to stretch that decision, by implication, again, as authority for the proposition that the system is not illegal "*per se*" via a deduction that this Court would not have so remanded the case if the system were in fact illegal "*per se*"—a matter, of course, on which this Court never passed, even though two Justices in the *Far East* case were even opposed to sending the case back to the Board, on the ground of primary jurisdiction. In this respect, the dissenting opinion of Mr. Justice Douglas, with whom Mr. Justice Black concurred, states:

> "it would seem plain that when a shipper is charged one rate if he gives the Conference a monopoly of his business and another and higher rate if the shipper uses a carrier not a member of the Conference, the shipper is being retaliated against for shopping around among carriers" [342 U.S. at 578, 579].

After this decision by this Court, while the Department of Justice did not lodge a complaint before the Board, it intervened, on the side of the Secretary of Agriculture who brought before the Board its Docket 725, directly challenging the legality of the dual rate system. When the Board dismissed the complaint of the Secretary, he filed, in the Court of Appeals for the District of Columbia Circuit, a Petition to Review the Board's decision, which Review is now pending under the name of *Ezra Taft Benson, Secretary of Agriculture of the United States* v. *United States of America and Federal Maritime Board* (13373).

(4) In *Isbrandtsen* v. *United States*, 211 F. 2d 51 (D.C. Cir. 1954), the Court of Appeals held, in the previous proceeding in this case, that the exclusive-patronage system constituted an "agreement" or "arrangement" under Section 15 of the Act and had to be filed for approval and approved, under that section, after hearing, before it could be used by the Conference. The Board had strenuously claimed that such approval was not necessary, and that the system should be allowed to go into effect without any opportunity for even a hearing. Petitions for certiorari to this Court by the Board and by the Conference were denied, *F.M.B. et al.* v. *Isbrandtsen Company*, 345 U.S. 975 (1952). A "Petition" signed by the present Chairman of the Board, then in private law practice, to file a brief *Amicus Curiae* on behalf of several conferences in support of the legality of the system was denied by this Court.

In each of these cases to which the Board was a party, its contentions were rejected and its orders were reversed, although the Board repeatedly evaded a Court decision on the basic question of illegality. It is certainly audacious—to say the least—that the Board's Counsel should now offer the above decisions as support for their contention that the Courts have held the system not "illegal per se" (Bd. Br., pp. 63-69).

Similarly, there is no support in any of the other cases cited by the Board or by the Conference for the proposition that the system is not illegal "*per se*."

Both the Board and the Conference cite *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U.S. 474 (1931),

(commonly called the "*Cunard Case*") to establish their contention that the decision of the Court below herein is in conflict with that decision of this Court (Bd. Br., p. 63; Conf. Br., pp. 50-60). Just how the *Cunard case* could possibly establish that proposition is difficult to perceive. That case was a suit by a private steamship company, under the Sherman Anti-Trust Act, 15 U.S.C. §§ 1-7, and the Clayton Act, 15 U.S.C. §§ 12-27, against a group of steamship lines using the exclusive-patronage system. It was held by this Court that a private party could not entertain the suit for injunctive relief under section 16 of the Clayton Act, 15 U.S.C. § 26, because the Shipping Board had primary jurisdiction over the factual subject matter of the complaint, under the Shipping Act. Nowhere in the opinion of either this Court or the Court of Appeals therein is there the slightest indication of a holding that the system was "not illegal *per se*", for that issue was not decided. Incidentally, the independent carrier in the *Cunard Case*, U. S. Navigation Company, is now a member of the North Atlantic Continental Freight Conference, which was therein involved, which conference *now uses* the exclusive-patronage system.

The complete absurdity of the Board and Conference position is most fully apparent, however, in their strained analysis of the case of *Swayne & Hoyt v. United States*, 300 U.S. 297 (1936). *The Board and the Conference virtually rest their case here upon language appearing in a footnote to this decision*, which language was merely a repetition of an uncontested "*argument*" made by the parties in that case to this

Court, which was irrelevant to any issue raised in the proceeding (Bd. Br., p. 65; Conf. Br., p. 61). On the basis of the reasoning of the Board and of the Conference, it is the first time in American jurisprudence that a footnote, attached to a judicial opinion, relating to an issue not raised in the case, is offered as the major part, or any effective portion, for that matter, of the Court's decision.

The *Swayne & Hoyt* case was an appeal by a Conference of a decision, by the Shipping Board Bureau (the then administrator of the Shipping Act) in *Gulf Intercoastal Contract Rates,* 1 U.S.S.B. 524 (1936), holding that the exclusive-patronage system was not justified and was unduly prejudicial in violation of section 16 of the Act [when used in the intercoastal trade]. The question of the illegality of the system as such was not pressed by either party to the appeal. The Conference therein, the appellant, argued that the system must be approved, and the Secretary of Commerce, representing the Shipping Board Bureau, sought merely to justify his decision on the facts in that case. There was, therefore, no "case or controversy" before this Court concerning *the basic illegality* of the system under any section of the Shipping Act, much less under any other statute or under the Constitution. The Court was necessarily limited to the issues before it, which concerned the sufficiency of the evidence, and any further expression would have at most constituted some sort of advisory opinion.

In the review of the agency decision in the *Swayne & Hoyt* case, both the Statutory District Court [18 F. Supp. 25 (1936)] and this Court [300 U.S. 297 (1937)]

held that the Secretary of Commerce was justified in holding that the system was unjustly discriminatory. The fact that there was no actual case or controversy before the Court on the fundamental illegality of the system *per se*, and, therefore no arguments presented to the Court alleging such illegality, accounts for the footnote on page 307 of this Court's opinion, which has been quoted, as creed, in every recent Conference and Board brief.[51] As explained above, the footnote contains certain incorrect conclusions conjured from the Alexander Committee Report, t the effect that "the Committee did not condemn the contract system completely." The footnote goes on to say, however, that:

> "The policy of the statute may be properly applied where, as in the circumstances of this case, the contract system must be taken as actually operating to effect a monopoly. Cf. *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, 1 U.S.S.B. 41."

If this footnote constituted "a holding", as Conference Counsel astoundingly asserts (Conf. Br., p. 62), it would be ample reason for the basic *il*legality of the present system. The Board has frankly admitted that the unmitigated purpose of the system is to secure a

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[51] The Court of Appeals, herein, below has commented upon this much inflated footnote, in *Swayne & Hoyt* case, as follows:

"It is urged that footnote 3 of the Court's opinion in *Swayne & Hoyt* is some authority for exempting the contracts in this case from Section 14, Third. There are two answers to this argument. First, the Court was there concerned not with a recommendation of the Alexander Committee but with an *argument* that had been addressed to the Committee. See H.R. Doc. No. 805, 63rd Cong., 2d Sess. 307 (1914)." (R. 264)

complete monopoly (See Supra, pp. 78, 79). Therefore, "the policy of the statute may properly be applied where, as in the circumstances of this case, the contract system must be taken as actually operating to effect a monopoly."

The *Swayne & Hoyt* case presented a most unusual situation, for there was no party to the case raising the question of the fundamental illegality of the system. The Board and the Conference here admit that the Secretary of Commerce did not assert such a position. The Board's present Report points out that the agency decision, from which appeal was taken in the *Swayne & Hoyt* case, had stated that (R. 44):

> "Whether any such dual rate system (in foreign commerce) is lawful is a question which must be determined by the facts in each case."

Such was, obviously, the argument that was presented to the Court by the Secretary of Commerce, as Respondent. It is not surprising, therefore, that the Court, under such circumstances, did not hold the system illegal "*per se*", for it would have been deciding a question on its own initiative that was neither raised, argued, nor briefed. The Court, confronted with this unusual situation, did no more than repeat the analysis made by the Shipping Board Bureau. Even if the Court had reversed the Shipping Board Bureau, it would not have constituted a holding in favor of the legality of the system, because the legality of the system just was not an issue in that case, either before the Court or the administrative agency. "Unjust discrimination" under Section 16 of the Shipping Act was the issue.

Neither Section 14, Third, nor any other section of the Shipping Act was involved in the *Swayne & Hoyt* case. The proscription of Section 16 is analogous to that of Section 3 of the Interstate Commerce Act. But the basic illegality of the system *was not in issue under even that section 16*—only the agency's factual determinations were in issue. The far more serious questions of illegality under Sections 14, 15 and 17 of the Shipping Act, and under the Anti-Trust Laws (because the system involves parties not subject to the Shipping Act), and the Constitutional issue were in no way raised in the *Swayne & Hoyt* case and had never been decided by any Court, prior to the instant decision of the Court of Appeals below, herein. The latter two questions concerning the involvement of shippers, who are not "persons" covered by the Act, and the constitutional questions were raised for the first time in this case, but not passed upon by the Court below, because the Court held the system illegal, under Section 14, Third.

The Conference in its Brief seems to urge that there was a case of controversy before this Court in the *Swayne & Hoyt* case on the ground that the District Court had held the system illegal "*per se*" under section *16* of the Shipping Act (Conf. Br., p. 60). It is certainly not clear that the District Court considered it was doing more than sustaining the Agency's decision, because the case arose under section 16 of the Act. Even if the Conference argument were valid, however, there is no support for Petitioners' argument of legality "*per se*", based on the decision of this Court in the *Swayne & Hoyt Case*, because this Court *affirmed* the decree of the District Court.

In any event, however, there was no case or controversy between any of the parties to the *Swayne & Hoyt* Case concerning the legality of the system, before either this Court or the Statutory District Court, and no one presented arguments on the illegality of the system. Moreover, the case arose under Section 16 of the Shipping Act, and it is impossible to make even a logical transition in the Conference argument which reaches the conclusion that this Court's footnote in the *Swayne & Hoyt Case*, "constitutes a holding that dual-rate systems are not illegal *per se under § 14, Third.*" Section 14, Third is not even mentioned in either the opinion of this Court or in the opinion of the District Court and there is absolutely no discussion whatsoever concerning its provisions. The only mention of section 14 appears in the footnote with reference to *deferred*-rebate systems under Section 14, *First*.

This analysis of the above-cases is fully confirmed by the Court of Appeals below. Judge Fahy, in this respect, stated the opinion of the Court as follows:

> "We are aware that the dual-rate system has not been held by any judicial decision to be invalid under section 14, Third; that is, without regard to the reasonableness or justness of the discrimination inherent in the system. We have already referred to *Swayne & Hoyt, Ltd.* v. *United States*, *supra*, which, though it upheld the Board in condemning the dual-rate system there involved, did not rest upon section 14, Third. In *Far East Conference* v. *United States*, 342 U.S. 570, the court, adhering to principles previously laid down in

United States Navigation Co. v. *Cunard Steamship Co.*, 284 U.S. 474, required the District Court to dismiss a suit of the United States which attacked the dual-rate system as violative of the Sherman Act without the particular system having been passed upon initially by the Board. And in *A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Co.*, 342 U.S. 950, the court by an equally divided vote affirmed *Isbrandtsen* v. *United States*, 96 F. Supp. 883, which had invalidated the dual-rate system there involved, not under Section 14, Third, but because the spread between the two rates was found to be arbitrary. . . ." (R. 244).

The understanding of the Court below concerning the above decisions of this Court is in conformity with every other case or authority that has ever commented on the subject. In *United States* v. *Alaska S. S. Co.*, 110 F. Supp. 104 (W.D. Wash., 1952), the District Court held that it had no jurisdiction to consider an injunction sought by the Department of Justice to enjoin an alleged conspiracy of a steamship company and its officers to prevent and to eliminate competition. The injunction was brought under the Sherman Act, but the Court held that the Maritime Board had primary jurisdiction to determine the facts. In its decision, the Court analyzed *United States Navigation Company* v. *Cunard, supra; Swayne & Hoyt* v. *United States, supra;* and *Far East Conference* v. *United States, supra*, and considered that each case supported the principle that the Board had primary jurisdiction.

At page 69 of its Brief, the Board advances the following unprecedented "legal" argument:

"It seems plain that if the system were illegal *per se*, as has been urged in each of the above cases, the outcome would long since been outright condemnation of the system."

The above comment of Board's Counsel shows very little appreciation or understanding of our system of jurisprudence or for the requirement that there must be a "case or controversy", and that a party must first fully exhaust his administrative remedies. The Courts of the United States do not render advisory opinions, nor do they decide issues presented until these basic requirements have been met. In applying the primary jurisdiction rule, the courts have taken the definite position that it makes no difference that the actions alleged would be ultimately held to be unlawful, if proven, and that they could not be approved by the Board. The allegations in the *Alaska S. S. Co.* Case, *supra*, set forth actions that would clearly have been in violation of the Anti-Trust Laws. It has similarly been held that a steamship owner could not maintain a suit to enjoin a competitor from operating proposed "*fighting ships*" at unreasonably low rates so as to ruin the plaintiff's business, because the question involved was within the exclusive primary jurisdiction of the Maritime Board. *Wisconsin & Michigan Transp. Co. v. Pere Marquette Line Steamers*, 67 F. 2d 937 (C.A. Wis., 1933). Certainly, the Board could not suggest that the action of the Court in sending the case to the Board gave rise to the implication that "fighting ships" could be approved as lawful "*per se*".

In view of the status of the cases before the Courts, it will undoubtedly come as a great surprise to this

Court that the Board would dare to assert that there has been even an implicit or tacit ruling on the legality "*per se*" of the exclusive-patronage system by this or any other Court, prior to the decision of the Court below.

Alleged approval and endorsement by "implication" or failure to "condemn" runs throughout the briefs of the Board and the Conference—straws they grasp at, because there is nothing of any substance to hang on to. All of their arguments can be boiled down to two *deductions by "implication", viz.*, that the dual rate system is lawful "*per se*" because neither the Alexander Committee nor the Courts have specifically "condemned" it. Those two weak reeds are absolutely all on which they can even lean.

III. The Board's Administration of the Statute Has Been Anything But Consistent

It must be with certain misgivings that Board and Conference Counsel advance the arguments that the Board decisions concerning the exclusive-patronage system have been "consistent" and are entitled to weight (Bd. Br. p. 69; Conf. Br., p. 67). We see little point in analyzing these decisions at great length, since they have already been touched upon in other parts of this brief. The Statutory District Court, in *Isbrandtsen Company* v. *United States*, 96 F. Supp. 883, 890 (S.D. N.Y. 1951), made the following comment concerning these Board decisions:

> . . . "the decisions of the Board (none of which approving a dual-rate provision has heretofore come to court) have lacked uniformity and consistency;

and, in such circumstances, administrative interpretations have little weight." (footnotes omitted)

Prior to *Pacific Coast European Conference*, 3 U.S. M.C. 11 (1948), the issue of the legality of the system directly under Section 14, Third had not been met, so that there had been no administrative decision analyzing the point. Since the time of the *Pacific Coast European* case, the question of the legality of the system has been in continual litigation before the Board and the Courts, in an attempt by the Departments of Justice and Agriculture, as well as Isbrandtsen, to obtain a definitive Court decision. Although the complaint in *Rawleigh v. Stoomvaart*, 1 U.S.S.B. 285, 288 (1933) had alleged violations of Sections 14, 16, and 17 of the Shipping Act, it had alleged "*unjust* discrimination", and there was consequently no analysis of the provisions of Section 14, Third, or of any other section of the Shipping Act in that case. Certainly, therefore, there has been no long-standing and consistent administrative determination of Section 14, Third prior to the time the issue was presented to the Courts starting in 1948 and thereafter, for there was no Agency decision on the point at all.

Before 1927, the Board's predecessor, the United States Shipping Board, had held the system illegal under *Sections 16 and 17 of the Act*. *Eden Mining Co. v. Bluefields Fruit & S. S. Co.*, 1 U.S.S.B. 41 (1922). After the case of *Rawleigh v. Stoomvaart*, *supra*, it is true that the Board and its predecessors have on a variety of theories held the system lawful *per se*, although the principles and rules established in one case have seldom been followed in the next. The so-called "principles" which the Board's Counsel

allege these cases have established (Bd. Br., pp. 72, 73) are entirely refuted by the fact that some fifty-seven conferences are now using the exclusive-patronage system without being confronted with any independent competition.

The pre-World War II opinions of the Board's predecessors—written when the agency was considerably closer in point of time than the present Board to the Congressional objectives and to the Congresional response of public indignation which led to the passage of the Shipping Act of 1916—at least give formal recognition to the proscriptions against "unjust discrimination" existing in the Act, although such recognition by the Board has become less discernible as the years have passed, and the steamship monopolies have become more openly defiant of any regulatory authority.[52]

The earliest case to arise before the Shipping Board, involving the system of exclusive-patronage, was *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, 1 U.S.S.B. 41 (1922). In that case the Shipping Board held that the practice of a common carrier charging higher rates to non-contract shippers than to contract shippers, who had agreed to patronize the carrier exclusively, was unjustly discriminatory in *violation of sections 16 and 17* of the Shipping Act. In this respect the Shipping Board held at pages 45 and 46 of its Report:

[52] The Monograph of the Attorney General's Committee on Administrative Procedure on the Maritime Commission, written in 1940, stated, on page 1, the conclusion that has been traditionally applicable to the Board's regulatory activity: "Despite the comprehensive regulatory powers conferred upon the Shipping Board by the act of 1916, the Board . . . throughout its existence failed to interest itself in the vigorous exercise of those powers."

"It is evident that the purpose of Congress in enacting these provisions [Sections 16 and 17 of the Shipping Act] of the statute was to impose upon common carriers within the purview thereof the *duty of charging uniform rates to all shippers receiving similar transportation service.* The duty of the respondent under these sections was to serve the public impartially, and we think the language used in the *W. U. Tel. Co.* v. *Call Pub. Co.* 181 U.S. 92, in dealing with a similar statute, is entirely applicable to the case in hand. The court there said: 'All individuals have equal rights both in respect to services and charges. Of course such equality of rights does not prevent differences in the modes and kinds of service and different charges based thereon. But that principle of equality does forbid any difference in charge which is not based upon difference in service, and even when based upon difference of service must have some reasonable relation to the amount of difference and can not be so great as to produce an unjust discrimination.' From the facts of record in the case before us it is manifest that the transportation service furnished the complainants and contract shipers was in all respects identical.

"It is suggested on behalf of the carrier that as the complainants were extended full opportunity to avail themselves of the lower rates by agreeing to the same condition which contract shippers had accepted, they were accorded the substantial equality of treatment contemplated by sections 16 and 17 of the act. This contention, how-

ever, is as unconvincing here as when used in support of other kinds of unjust discrimination resulting from unfair conditions imposed by carriers upon shippers. *Under the statute, the complainants, as members of the shipping public, were entitled to have their shipments carried at the same rates as other patrons who received identical service. This right attached to each individual transportation transaction as such, and was not to be predicated upon any condition imposed by the respondent restricting the complainants' freedom of choice as to what carrier or carriers they should elect to patronize in connection with subsequent shipments.*"

In the second paragraph quoted above, the Shipping Board held that it was no answer to this "unjust discrimination" that the shipper refusing to sign the exclusive-patronage contract had an opportunity to do so, and thereby get the lower rates, if he so chose. This alleged "freedom" of all shippers to sign has been repeatedly advanced by the Board and conferences as a complete defense against any claim of "unjust discrimination". It belongs in the same category as that other "freedom", constantly reiterated by the Board and the Conferences, *viz.*, that Isbrandtsen and other independents have the complete "freedom" to join the conference, when they can no longer withstand the conference practices, including the exclusive-patronage system. Of course, we should point out, the independents have another "freedom", which was explained by

Board Counsel, to the Statutory District Court, in *Isbrandtsen v. United States, supra* (see *supra*, page 78), *viz.*, "to go out of business".

The Shipping Board, in the *Eden* case, held that the facts before it involving the exclusive-patronage system were "analogous" to those involved in *Menacho et al.* v. *Ward*, 27 Fed. 529 (C.C.S.D.N.Y., 1886). The Board stated that the *Menacho* case pronounced the *common-law doctrine* that such exclusive-patronage system was unlawful. The clear principles announced by the Shipping Board in the *Eden* case have long since been lost sight of and have been "qualified" away by subsequent agency decisions.

After the decision of the Shipping Board in the *Eden case*, the Board in 1926 instituted an investigation into existing exclusive-patronage contract systems. This case, which received the title, *Ex Parte 5, Contract Rate Investigations*, was subsequently dismissed by the Board in 1927 under rather mysterious circumstances and was never reported. A Report is usual even when a case is dismissed by an administrative agency.

The condemnation by the Shipping Board of the exclusive-patronage-contract system in the *Eden* case was thereafter followed by the Shipping Board Bureau in *Intercoastal Investigation, 1935*, 1 U.S.S.B.B. 400, 451, 452 (1935), where it was held:

> "An underlying purpose of the shipping Act, 1916, is to prevent every form of favoritism based upon the relations of the shipper with the carrier as a customer and to place all shippers, the large

and small, the steady and occasional, upon a plane of equality in the right to service. For this reason that act condemns and makes unlawful every regulation, device, or subterfuge which undertakes to give to anyone an advantage based upon conditions other than those inhering in the transportation itself and alone. Contracts of the character in question do not constitute a transportation condition as to warrant a difference in transportation rates. Furthermore carriers are not justified in attempting to restrict traffic to move over their lines."

Also, to the same effect, as the holding in the *Intercoastal Investigation* case, was the decision of the same Shipping Board Bureau in Gulf *Intercoastal Contract Rates*, 1 U.S.S.B.B. 524 (1936), which was later *affirmed* by the Supreme Court, in *Swayne & Hoyt* v. *United States, supra;* the latter case being greatly relied upon in the Board's present Report, where selected language (certainly not more than dicta) is extracted from the Court's opinion, although the language selected was unnecessary to the decision and irrelevant to it.

The last administrative decision involving the exclusive-patronage system prior to the Second World War, was *Contract Routing Restrictions*, 2 U.S.M.C. 200 (1939), where the Maritime Commission, relying on the above-mentioned decisions of its predecessors, stated as follows:

> "Since they carry more than 80 percent of the traffic from the Great Lakes Area, it is obvious that respondents, for all practical purposes have a monopoly. A difference in rates for identical services based solely upon whether or not the carrier secures the shipper's entire patronage is prima facie discriminatory.

As the *Contract Routing* case demonstrated, the criterion employed by the Board's predecessors in outlawing the system was not the nature of the commerce, whether foreign or intercoastal, but the monopolistic nature of the system. Significantly, the Commission held that carrying more than 80 per cent of the trade would amount to a monopoly, which is to be contrasted with the Board's present view which concedes that the Conference here will get at least 90 per cent of the cargo. The Commission also stated that it had been held in *Rawleigh* v. *Stoomvaart, et al.*, 1 U.S.S.B.B. 285 (1933) that special rates may be granted in foreign commerce "when based upon regularity of consignments, number of shipments or quantity of merchandise furnished for transportation . . ." This, however, is not the question involved in the system now before this Court, for the contract rates are available to all shippers who would agree to patronize conference carriers exclusively, whether they might have a shipment every week or one every ten years, and irrespetive of any volume.

These principles, announced in the pre-World War II decisions of the Board's predecessors, although largely inconsistent with one another, are certainly

vastly different from the new "principles" which the Maritime agencies have announced since 1948, during which recent period the legality of the system has, for the first time, been actively and diligently questioned.

IV. The Exclusive-Patronage System Is Fundamentally Unlawful for Various Reasons Other Than the Violation of Section 14, Third.

In addition to the basic and unavoidable illegality of the exclusive-patronage system under Section 14, Third of the Shipping Act, as the Court of Appeals has held, the system is fundamentally unlawful for various other reasons. These other issues, while submitted, were not met in the decision of the Court below, and it was unnecessary for the Court to meet them, in view of its holding that the system is unlawful under Section 14, Third. The additional obstacles which the exclusive-patronage system would have to overcome, in order to be rendered legal, are of substantial importance, and constitute further cogent reasons why the Judgment of the Court Below Should Be Affirmed.

The exclusive-patronage system is also fundamentally unlawful for at least the following reasons:

First, it is unjustly discriminatory and unduly prejudicial in contravention of sections 15, 16 and 17 of the Shipping Act.

Secondly, the Board could never have any discretion or authority to approve the exclusive-patronage system because it involves as its main and most essential ingredient an exclusive-patronage contract to be entered into between common carriers and shippers, the latter parties not being "persons" subject to the Ship-

ping Act nor consequently capable of receiving any immunity from the Anti-Trust Laws, under section 15 of the Shipping Act.

Thirdly, the Board's interpretation of the Shipping Act would render section 15 of the Act unconstitutional, and consequently invalid, as an improper delegation of legislative powers and because it would deprive Isbrandtsen and other carriers of property without due process of law.

A. The Exclusive-Patronage System Is Unjustly Discriminatory

The system is also necessarily and fatally illegal because it is unduly prejudicial and unjustly discriminatory in violation of sections 15, 16, and 17 of the Act. These are terms which have had a long and settled construction in Anglo-American transportation law—which construction it was necessary for the Board to disregard, in order to reach its preconceived conclusion that the system is not illegal.

Sections 15 and 17 of the Act, prohibit, *inter alia*, common carriers from charging rates that are "unjustly discriminatory", or unfair or unjustly prejudicial.

Section 16 of the Act prohibits, *inter alia*, such carriers from giving any shipper any undue or unreasonable preferences or advantage in any respect whatsoever.

Section 17 of the Shipping Act in this respect has its immediate origin in and bears close resemblance to section 2 of the Interstate Commerce Act, 49 U.S.C.

sec. 2,[53] which section was in turn derived from the so-called equality clause of the English Railway Clauses Consolidation Act of 1845.[54]

Section 16 of the Shipping Act—as the Board admits (R. 55)—was patterned after section 3(1) of the Interstate Commerce Act, 49 U.S.C. sec. 3(1), which in turn was adopted from section 2 of the English Railway and Canal Traffic Act of 1854.[55]

It is undisputed that the Alexander Committee in drafting the Shipping Act relied heavily on the previous regulatory experience of the Interstate Commerce Commission.[56] In the light of this legislative history, various cases have held that it was the intention of Congress that the settled construction of the earlier Interstate Commerce Act must be applied to the Shipping Act, unless in particular instances something peculiar in the question under consideration, or

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[53] The legislative history of the Shipping Act is decisive that Congress intended that two shippers identically situated should not be obliged to pay different rates for the same transportation service. There is no doubt that the unjust discrimination proscription in section 17 of the Shipping Act was intended to apply the explicit proscription contained in section 2 of the Interstate Commerce Act of 1887. See House Hearings on H.R. 14337, 64th Cong., pp. 28-29, 31-32, 40, 84, 88-89, 110, 127, 139; Senate Hearings on H.R. 15455, pp. 146, 242, 243, 249, 250.

[54] See *Texas & Pac. R. Co. v. Interstate Commerce Commission*, 162 U.S. 197, 222 (1896).

[55] See *Interstate Commerce Commission* v. *B. & O. R. Co.*, 145 U.S. 263 (1892) *Texas, etc. R. Co.* v. *Interstate Commerce Commission*, *supra*.

[56] The Committee studied the "decisions and files of the Interstate Commerce Commission." H.R. Doc. 805, 63rd Cong., 2nd Sess. (1914), p. 4. It furthermore hired as consultants two experts on railway transportation, Professors Huebner and Johnson of the University of Pennsylvania, who participated in the drafting of the bills.

dissimilarity in terms of the Acts, requires a different construction. *Inter-Island Steam Nav. Co. v. Territory of Hawaii*, 305 U.S. 306 (1938); *United States Navigation Co. v. Cunard Co.*, 284 U.S. 474 (1931 supra); *Prince Line* v. *American Paper Exports, Inc.*, 55 F. 2d 1053 (1932).

There has never been a judicial decision under the Shipping Act, the Interstate Commerce Act, or under any other transportation act, which has held a discrimination in rates to be justified, where two different rates were charged for identical transportation services to similarly situated shippers. Despite the Board's attempt to avoid facing the problem, the exclusive-patronage system involves an admitted situation—which no one can escape—that of a common carrier, obligated to take all cargo offered, charging two different rates, for the identical transportation services—volumes even being identical—to two similarly situated shippers, from the same point of origin to the same destination, —and even on the same ship—the higher rate being charged in retaliation for the shipper's refusal to give the carrier its exclusive patronage and his refusal to boycott other carriers.

It is well settled that a discrimination in rates by a common carrier can only be "justified by the cost of the respective services, by their values, or by other transportation conditions." *United States* v. *Illinois Central R. Co.*, 263 U.S. 515 (1924). The decisions are unanimous—with no authority to the contrary—that different rates for identical transportation services result in unjust discrimination. *Wight* v. *United States*, 167 U.S. 512 (1897); *Louisville & Nashville*

Railroad Co. v. *Mottley*, 219 U.S. 467 (1911); *Chicago, Ind. and L. Ry. Co.* v. *United States*, 219 U.S. 486 (1911); *I.C.C.* v. *Delaware, L. & W. Railroad*, 220 U.S. 235 (1911); *I.C.C.* v. *B. & O. Railroad*, 225 U.S. 326 (1912); *Fourche Lumber Co.* v. *Bryant Lumber Co.*, 230 U.S. 316 (1913); *Seaboard Air Line Ry. Co.* v. *United States*, 254 U.S. 57 (1920).[37]

In its hopeless groping for analogies—there being none—the Board, without citing or attempting to distinguish any of the above cases, has hit upon situations which are entirely irrelevant to the factual circumstances of this case. Thus the Board cites in its Report three cases—none now cited to this Court—*Eastern Central Motor Carriers Ass'n.* v. *United States*, 321 U.S. 194 (1944); *Texas and Pacific Ry.* v. *United States*, 289 U.S. 627 (1933); *I.C.C.* v. *Alabama-Midland Ry.* 168 U.S. 144 (1897), for the proposition that "carrier competition has been considered a factor to be weighed in justification of a prima facie discrimination or preference" (R. 55). These cases all arose under section 3(1) of the Interstate Commerce Act and concern the charge of unreasonable preference or advantage. None of the cases involves the charging of different rates by a common carrier for the same transportation service. Obviously, competition may be a

[37] The cases at common law are in accord with this principle. In *Messenger* v. *Pennsylvania Railroad Co.*, 7 Vroom (36 N.J.L.) 407, 410 (1873), aff'd 8 Vroom (37 N.J.L.) 531 (1874), the Court said: "Recognizing this as settled doctrine, I am not able to see how it can be admissible for a common carrier to demand a different hire from various persons for an identical kind of service, under identical conditions." See also *Menacho* v. *Ward*, 27 Fed. 529, 533 (C.C.N.Y. 1886).

factor in justifying a preference where different transportation services are involved. Thus a *motor* carrier may be justified in granting a volume discount in order to make its rates competitive with *railroad* rates, which was the situation in *Eastern Central Motor Carriers Ass'n.* v. *United States, supra.* Similarly, where a carrier is offering a service to City C from both Cities A and B, it may be justified in offering a lower rate from A to C than from B to C, notwithstanding the fact that the distance from A to C may be the same or longer than the distance from B to C, because the carrier encounters competition from other carriers at the former points but not at the latter. *Texas and Pacific Ry.* v. *United States, supra; I.C.C.* v. *Alabama-Midland Ry. Co., supra.* The Board has never—and will never—find a case,[58] however, holding that competition justified a common carrier in charging discriminatory rates for *identical transportation services* in the same form of transportation—water, for instance—for shippers, similarly situated at the same point of origin, under identical circumstances and conditions of carriage.

Similarly, the Board in its persistent groping for some justification of its unprecedented position, however flimsy, hits upon the "volume discount", which it considers "highly analogous" (R. 56). The Court of Appeals below has held that the present exclusive patronage contracts are not "requirements" contracts, see supra pages 45 and 46. Admittedly "requirements" contracts may have legitimate utility when based upon

[58] Other than its own.

bona fide considerations of cost and value of the services rendered. Cf. *Standard Oil of Cal.* v. *United States*, 337 U.S. 293, 306 (1949). *It is by no means clear that even requirements contracts could be legal under the Shipping Act.* The Board and the Conferences formerly proffered round-trip and commutation tickets as analogies, but, of course, there is no exclusive-patronage contract involved in these dealings. Significantly the Board cites no court decisions to support its unfounded and perverted theory. Moreover, it had found in this very case that:

> "There would, under the dual rate system, be no difference in the cost or value of service rendered to two shippers, one of which is a contract signatory and the other of which is not a contract signatory, although the cargoes might be identical and identically destined." (R. 55).

The exclusive-patronage system has no relation to volume of cargo, as the Board's Report admits (R. 56). The "contract shipper" does not agree to ship any cargo whatsoever—the contract shipper of one ton of cargo would receive the same contract rate as the contract shipper of 100,000 tons, while the non-signing shipper of 100,000 tons would pay the higher non-contract rate on every ton. Furthermore, Section 14, Fourth of the Act proscribes "any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered."

The Board's Report further contends that an unjust discrimination—not founded upon any transportation differences—can be defended on grounds of con-

ference "self-protection" and "survival" (R. 60). Nothing in the Record not in the Board's Report, nor elsewhere, supports the proposition that the exclusive-patronage system is necessary for, or indispensable to, the survival or continuance of the conference system.[59] Even if the Board's unfounded observation concerning such need for the system were a fact—which it is not[60]—the argument is legally irrelevant. *No one has had the temerity to suggest that the Board could approve the "deferred rebate system" or the "fighting ship" because of some supposed essentiality of those prohibited devices to the survival of the conference system.* These same arguments of indispensability were offered unsuccessfully in defense of the exclusive-patronage *deferred*-rebate system, before that system was specifically prohibited by the Shipping Act of 1916. In *Thomsen* v. *Cayser*, 243 U.S. 66, 87, 88 (1917), which case arose just before the enactment of the Shipping Act of 1916, this Court rejected these traditional—and still persisting—arguments of the Conferences that exclusive-patronage arrangements were necessary and were beneficial to commerce in producing "regularity of service" and "stability of rates",

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[59] Ironically enough, the only example furnished by the Board here of "cut-throat" competition, which the system is supposed to avoid, was the rate war started by the Conference itself on March 12, 1953 (R. 12).

[60] There is no support in the Board's findings of fact for the proposition that the exclusive-patronage system is essential for the continuance of the conference system. All evidence is, in fact, to the contrary. According to the Board's own records, of the 125 conferences under its jurisdiction, only 62 use the system, and only 7 of these conferences, at most, have any alleged non-conference competition whatsoever.

phrases used throughout the Briefs of the Board and Conference [For example, see Bd. Br., pp. 32, 33]. In its decision holding the exclusive-patronage deferred rebate systems, there involved, to be in violation of sections 1 and 2 of the Sherman Act, this Court answered the plea of the monopolists concerning the claimed beneficial results of their monopoly as follows:

> "... and it finds no justification in the fact that defendants' 'contributions to trade and commerce' might 'have been withheld.' This can be said of any of the enterprises of capital, and has been urged before us to exempt them from regulation even when engaged in business which is of public concern. *The contention has long since been worn out* and it is established that the conduct of property embarked in the public service is subject to the policies of the law." 243 U.S. at 88.

B. The Board Has No Discretion Ever To Approve the System Because It Involves Persons, as Parties, Who Are Not Subject to the Shipping Act

Section 15 of the Shipping Act provides for an extraordinary privilege, that of exempting certain agreements from the provisions of the Anti-Trust Laws. *Only agreements between "common carriers" and "other persons subject to this Act,"* however, can ever receive such exemptions. Shippers, in their capacity as shippers, *are neither "common carriers" nor "other persons" subject to the Act*, as those expressions are defined in Section 1 of such Act. *The present exclusive-patronage system involves, as its main and essential constituent, an exclusive-patronage contract to be*

entered into between the Conference (and its member lines) and shippers. Such contracts or agreements with shippers as parties cannot be approved by the Board under the clear language of section 15, and consequently *cannot receive any immunity from the Anti-Trust Laws.* While the conference system, as such, may have immunity from the Anti-Trust Laws, the exclusive-patronage dual-rate system can never receive any immunity.[61]

Stripped of any color of immunity, there can be little doubt that the system violates Sections 1 and 2 of the Sherman Act, 15 U.S.C., because it is an admitted combination or conspiracy formed with the purpose of restraining commerce, eliminating, suppressing, and preventing competition, and attempting to monopolize the trade. *The Court of Appeals—in the previous appeal of this very Japan-Atlantic case—recognized that, unless such agreements can be approved by the Board under Section 15 of the Act, they are "subject to the operation of the Anti-Trust Laws, under which price fixing agreements are illegal per se." Isbrandtsen Company* v. *United States,* 211 F. 2d 51 (1954). Board and Conference Petitions for Writ of Certiorari in that case were denied by this Court, *Japan-Atlantic & Gulf Freight Conference* v. *United States,* 347 U. S. 990 (1954).

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[61] Prior to the *Isbrandtsen* case, *supra*, which required the filing for and approval of a dual rate system, the Board took the position that rates under a dual rate system were filed merely as tariff information, to which filing there was sometimes appended the form of shippers' contract employed. This was likewise considered a mere filing, and the Board paid no other attention to either filing.

Certainly, insofar as the Sherman Act is concerned, the essential purpose of the exclusive-patronage system and the method of accomplishing it are no different than those of the exclusive-patronage deferred-rebate system—which was specifically outlawed by the Act. The case of *Thomsen* v. *Cayser, supra,*—arising just before the passage of the Shipping Act—constitutes a clear-cut holding of this Court that the exclusive-patronage systems violate sections 1 and 2 of the Sherman Act. If the exclusive-patronage system in the *Thomsen* case had been this instant *pre*ferred-rebate system, rather than the *de*ferred-rebate system, the result would have been the same, and there has been no legislation, since that time, exempting the exclusive-patronage *pre*ferred-rebate system, or any other similar system, from the Anti-Trust Laws.

C. The Board's Interpretation of the Statute Would Render Section 15 of the Shipping Act Unconstitutional.

There are two fundamental reasons why the Board's interpretation of Section 15 of the Shipping Act, as authorizing the possible approval of exclusive-patronage systems, would render that section of the Act unconstitutional, namely, first, it would constitute an unlawful delegation of legislative authority to an administrative agency, which in this case would be redelegated to private individuals, in violation of Article I, Section 8, of the Constitution of the United States, and, secondly, it would result in an unlawful deprivation of private property, without *Due Process of Law.*

There can be no question but that the Board is required to observe a strict interpretation as to the legitimate purpose of Section 15 of the Shipping Act, inasmuch as it provides for a departure from prior public policy, the common law, and the provisions of the Anti-Trust Laws. The Board's interpretation of the Shipping Act, insofar as such interpretation contemplates possible approval of the exclusive-patronage system—would render Section 15 of the Act unconstitutional, as an unlawful *delegation of legislative* authority, in violation of Article 1, Section 8, paragraph 18 of the Constitution of the United States. *Schechter Corporation* v. *United States*, 295 U. S. 495 (1935); *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935); *Fashion Originators' Guild of American* v. *Federal Trade Comm.*, 312 U.S. 457, 465 (1941).

The Board's interpretation would confer upon the Conference, a private cartel, the absolute power to exclude any independent carrier from the trade unless the independent joined the Conference, dominated by foreign lines, and accepted all the terms of the Conference Agreement and all Conference rules and regulations. The conferring of such authority on the Board would, moreover, violate the due process clause of the Fifth Amendment, as exceeding the extent of permissible deprivation or property without due Process of Law. Admittedly, the exclusive-patronage system is intended to achieve and to perpetuate a monopoly for the Conference and to force all independent competition either into the Conference or out of business (See *supra*, pp. 78 to 79). "This is coercion by economic pressure. The asserted power of choice is

illusory." *United States* v. *Butler*, 297 U.S. 1, 71 (1936).

In *Frost Trucking Company* v. *Railroad Commission of California*, 271 U.S. 583 (1925), the question arose as to the constitutionality of a California statute which prohibited a motor carrier from operating on the public highways of the State unless he had obtained a certificate of public convenience and necessity as a *common carrier*. The Frost Company was a *contract carrier* and was ordered by the State to suspend operations until a certificate as a common carrier had been obtained. The statute was held unconstitutional by this Court as violative of the due process clause of the 14th Amendment. It was held by this Court that even a State cannot consistently with the due process clause require a private carrier to become a common carrier against his will. Certainly the Federal Maritime Board could not consistently with due process require a non-conference carrier to become a conference carrier against his will, much less could it pass on such a predatory power to private parties.

Although this argument and the *Frost case* have often been cited in the briefs of Isbrandtsen before the Board and in the Courts, neither the Board's Report nor the present Briefs of the Board and Conference contain any reference to it.

The vice of the predatory power—passed on by the Board to the Conference—is even more alarming when it is recognized that the exclusive-patronage system would be applicable to "all commodities moving in the trade." This includes bulk commodities, often carried in full ship loads by tramps. The exclusive-patronage

system is thus intended to prevent and to suppress all independent competition, *viz.*, both common carriers and contract carriers or "tramps" alike. For the Conference to reply that any shipper, *needing to ship a full ship load by a tramp,* might receive the gracious permission of the Conference—*after a possible wait of 20 days*—is no answer to the illegality of the overall inclusion of even tramp cargo. This is but one example of the persistent attitude of these private cartels that they can pick and choose as to when and where they will or will not enforce the provisions of the exclusive-patronage contract. Even that professed attitude of "benevolent" discretion in itself brands the whole arrangement as unlawfully discriminatory.

Furthermore, the opportunity extended to the Conference to extend its monopolistic control *over "all shipments" of the contract shipper,* even his bulk commodities, which normally move in full shipload lots, or "tramp" service, is enhanced by the well-known fact that many conference lines, from time to time, operate tramp vessels themselves. Under the particular exclusive-patronage contract of the Japan-Atlantic Conference, the shipper agrees unqualifiedly "to forward or cause to be forwarded *by the vessels of the carriers all shipments* made directly or indirectly by him . . ." in the Conference trade. The contract thus is not limited to any particular commodity, nor does the phrase, the "vessels of the carriers", limit, in any way, the obligations of the shipper to *those vessels of the Conference* lines which operate in common carrier, or so-called "berth" or "liner" service.

On the other side of the picture, the Conference lines, as has been pointed out previously, and as admitted on page 5 of the Conference Brief, *do not undertake to provide any specific amount of service, nor do they guarantee to carry all of the cargo the shipper may offer.* The exclusive-patronage contract provides that the Conference lines "agree to carry the shipper's cargoes [only] so far as their regular services are available. . . ". The viciousness of this situation is astounding, when it is considered that the Conference lines can, under the terms of the contract, force a shipper to use "tramp" or contract carrier vessels of the Conference lines, but that the *shipper signing the contract could not patronize a company not belonging to the Conference, which operated only "tramp" vessels, and the latter type of company could not possibly join the Conference, because it would not be eligible under Section 15, not being a "common carrier".*

While Isbrandtsen, as a common carrier engaged in regular liner operations, might possibly be able to postpone its elimination from business, if the exclusive-patronage system were to be instituted, by joining the foreign-dominated Conference, *such a solution is not even open to contract or tramp carriers, with which operators Conference lines are continuously in competition,* and the Board and Conference have strenuously urged that type of competition as a ground for allowing them to employ the system. It has traditionally been argued by the Board and the Conferences that any non conference operator can relieve himself

of any disadvantage by "joining up" with the Conference. Such an unconscionable solution, however, it must be emphasized, is not open to the tramp operator, because *only "common carriers" are subject to the Shipping Act*, and tramp and other private or contract carriers are explicitly excluded from regulation; such carriers are *not* permitted to form conferences under Section 15 and cannot join conferences that have already been formed and are in existence. Thus, even if the alarming arguments of the Board and conferences, that the Independent can join the Conference if he sees fit to stay in business, were otherwise valid, such arguments are completely invalidated in the case of the tramp.

For about ten years Isbrandtsen has struggled to compel the Board and its favored conferences to face up to all the foregoing evasions and alibis to which they have resorted in order to perpetuate a transportation scheme which has always been unlawful, at common law, under the Anti-Trust Acts and under the Shipping Act. We have now arrived at the final showdown.

Conclusion

On the basis of the sound and thorough consideration of the law, in the opinion of the Court below, holding the exclusive-patronage system illegal under Section 14, Third of the Shipping Act, and for the additional reasons related herein concerning the illegality of said system under Sections 15, 16 and 17 of said Act and the violation by said system of the Constitu-

tion of the United States, the Judgment of the Court below should be Affirmed.

Respectfully submitted,

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WASHINGTON, D. C.

Certificate

I, John J. O'Connor, Counsel for Isbrandtsen Company, Inc., and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 14 day of October, 1957, I served copies of the foregoing Brief on counsel for all parties of record by mailing copies to their offices in duly addressed envelopes with postage prepaid, or by delivery to them in person.

JOHN J. O'CONNOR.

APPENDIX A

Statutes Involved

A. Pertinent Parts of Shipping Act of 1916 (46 U.S.C. § 801, et seq.):

§ 14 (46 U.S.C. 812):

Rebates and discriminations by carriers by water prohibited; use of "fighting ship"

No common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

* * * * * * *

Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

* * * * * * *

§ 15 (46 U.S.C. 814):

Contracts between carriers filed with commission

Every common carrier by water, or other person subject to this chapter, shall file immediately with the commission a true copy, or, if oral, a true and complete memorandum, of every agreement, with

another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The commission may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the commission shall be lawful until disapproved by the commission. It shall be unlawful to carry out any agreement, or any portion thereof disapproved by the commission.

All agreements, modifications, or cancellations made after the organization of the commission shall be lawful only when and as long as approved by the commission, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

§ 16 (46 U.S.C. 815):

Discriminatory acts prohibited

* * * * * * *

That it shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

First, To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

* * * * * * *

§ 17 (46 U.S.C. 816):

Discriminatory rates prohibited; supervision by commission

No common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the commission finds that any such rate, fare, or charge is demanded, charged, or collected, it may after the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

* * * * * * *

B. Relevant Parts of the Constitution of the United States:

Article I, Sec. 1:

"All legislative power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Article I, Sec. 8, par. 18:

"The Congress shall have power to * * * make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers * * *."

Amendment, Article V:

"No person shall be held to answer for a capital, or otherwise infamous crime unless, on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

C. Sections 1 and 2 of the Sherman Anti-Trust Act (15 U.S.C. Secs. 1, 2):

SHERMAN ACT[1]

[*Contract, Combination or Conspiracy in Restraint of Interstate or Foreign Commerce Illegal; Penalty*]

Sec. 1. [26 Stat. 209; 50 Stat. 693; 15 U.S.C. § 1.] Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided*, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears,

[1] Act of July 2, 1890, c. 647, 26 Stat. 209, 51st Cong., 1st Sess. (S. 2, Public 190), as amended by Act of March 3, 1911, c. 231, 36 Stat. 1167, and Act of Aug. 17, 1937 ("Miller-Tydings" Act), c. 690, 50 Stat. 693, 75th Cong., 1st Sess. (H. R. 7472, Public 314).

or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes", approved September 26, 1914: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

[*To Monopolize, Attempt to Monopolize, Combine or Conspire a Misdemeanor; Penalty*]

Sec. 2 [26 Stat. 209; 15 U.S.C. § 2.] Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 73-74

FEDERAL MARITIME BOARD,
Petitioner,
v.
ISBRANDTSEN COMPANY, INC., UNITED STATES OF AMERICA, ET AL.,
Respondents

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE, MITSUI STEAMSHIP CO., LTD., ET AL.
Petitioners,
v.
UNITED STATES OF AMERICA, ET AL.,
Respondents

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT, ISBRANDTSEN COMPANY, INC., IN REPLY TO THE FILING, BY THE PETITIONER, FEDERAL MARITIME BOARD, AND RESPONDENTS, THE UNITED STATES AND THE SECRETARY OF AGRICULTURE, CONTAINING EXCERPTS FROM THE SO-CALLED "ALEXANDER REPORT," AS A "JOINT APPENDIX" TO THEIR PRIOR FILED BRIEFS.

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Washington Building,

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The extraordinary filing, as a Joint Appendix to the Brief of the Federal Maritime Board and Brief of the United States and the Secretary of Agriculture,

containing excerpts from the so-called "Alexander Committee Report" should receive no attention by this Court for the following reasons.

In a "Prefatory Note" (Filing p. 1) [1] signed by the Solicitor General and by the General Counsel for the Federal Maritime Board, it is stated

> "The submission of this material," (208 printed pages) "however, carries with it no implication as to its relevance or significance in the legislative history of the Shipping Act, 1916."

The sole basis, on which all references in the briefs to that alleged "Report" are grounded, is the assertion that the "Document" is "legislative history" behind the Act.

This frank admission of Counsel, offering the Filing, should, in itself, be sufficient to relegate the filing to the category of the Board's Reply Brief, (p. 9) that the said reply brief "is precautionary only"—whatever that may mean!

If the foregoing concession were not sufficient to deter the Court from occupying its invaluable time in attending to non-"significant" and ir"relevant" offerings of litigants, the following additional considerations of said "Report" should conclusively prove its worthlessness:

1. The so-called "Alexander Report", from which the excerpts have been selected, is not in

[1] References herein to the "Filing" are to the so-called "Joint Appendix" to which this Brief is in response. All emphasis in quotations has been supplied.

any sense a Congressional Committee Report accompanying any legislation.

2. The excerpts were actually taken from a four (4) volume account of "Proceedings of Committee on Merchant Marine and Fisheries in investigation of shipping combinations under H. Res. 587, 62nd Congress", of which the first three volumes constitute testimony and evidence taken by the Committee, and the fourth volume is almost entirely merely a summary of this evidence.

3. The entire four (4) volumes of "Committee Proceedings", except perhaps for ten pages of "recommendations" at the very end of the fourth volume, were compiled by a staff member, one S. S. Huebner, hired by the Committee.

4. These four (4) volumes of "Committee Proceedings", other than the recommendations, were described by the said writer, Professor Huebner, as "a summary of data gathered by the Committee". See Professor Huebner's signed "Prefatory Note" to Volume 4 (Filing pp. 127-136) in which he refers to the entire proceeding as an "investigation" (Filing p. 129); he states further that much of the material was "obtained by correspondence with the parties involved" (Filing, p. 131); that Volume 3, for instance, is wholly occupied with responses from "consular representatives of the United States in foreign countries" in response "to a circular" sent out by "the Department of State" (Filing p. 131); that "the evidence" (obtained at the hearings, held from "January 7 to March 3, 1913") "was published in the first two

volumes of the Committee's *Proceedings*" (Filing p. 133).

Professor Huebner goes on to state (Filing p. 133-134)

"While numerous individual shippers voluntarily presented their grievances to the Committee, under promise of confidential treatment, very few were willing (*fearing retaliation*) to testify openly against the steamship line or lines upon which they were dependent for the movement of their freight.

"(7) At the conclusion of the hearings, and in view of the contentions of the *conference* line representatives and the reluctance of shippers to express their complaints openly for fear of retaliation, the Committee decided, under promise of confidential treatment, to ascertain approximately the extent to which *leading* shippers indorsed [6] the views of the *conference* line representatives."

And at page 135 of the Filing, the Professor further states,

"The following pages" [the rest of Volume IV] "represent the bringing together, in the form of a classified *summary* of all the essential *facts* obtained from all sources just enumerated." (Italics supplied)

5. The *fourth volume, alone*, of the Committee *Proceedings* was published as *H. Doc.* 805, 63rd Cong., 2d Sess., only with *special authorization* of the House of Representatives, which authorization would not have been necessary if the document had been a legislative *report*. We emphasize

that only Volume IV was directed to be printed, and as a "Document", and none of the four (4) volumes were authorized to be printed as a "Report."

6. This entire "summary" of evidence, compiled by Professor Huebner, which has been erroneously referred to as the "so-called Alexander Report", was not specifically endorsed by any member of the Committee, which is not surprising because when Volume IV was printed, in 1914, fifteen (15) of the twenty-one (21) members of the then House Committee had not been members of the Committee when the hearings were conducted.

Isbrandtsen, as Respondent in both proceedings herein, feels compelled to answer this filing because of the erroneous impression it attempts to convey, by referring to a "summary" of evidence and a compilation of testimony, prepared by a hired employee of the Committee, as a Congressional "Report". As pointed out in the original Brief of Respondent, Isbrandtsen, there is nothing in this four volume account of Committee Proceedings that could conceivably lend any support to Petitioners' position. These Committee Proceedings, however, are not even entitled to consideration by this Court, as valid "legislative history". At most, the "so-called Alexander Report" is in the same status as printed volumes of ordinary committee *hearings*, which certainly have little persuasive force in determining legislative intent, especially when such hearings were not held in connection with any draft of legislation, and contain no statement of even one committee member.

The "excerpts" from Committee Proceedings contained in the Joint Appendix, in short, have no relevancy in the "legislative history" of the Shipping Act, even if such resort to legislative history were necessary or "helpful", which we believe it is not.

Respondent, Isbrandtsen, undertakes, below, to show how irrelevant and insignificant this material really is. Isbrandtsen, of course, has had no previous opportunity to answer this filing, a final page proof of which was delivered to the undersigned on November 7, 1957. We first became aware of the plan of the Federal Maritime Board to file such a document, however, when telephoned by the Board's "Special Counsel", asking Isbrandtsen to join in it. For reasons explained in the following discussion, concerning the nature of the "so-called Alexander Report", Isbrandtsen's consent thereto was refused. On October 23, 1957, Isbrandtsen's Counsel sent a letter to the Board's "Special Counsel", with copies to all parties and to the Clerk of this Court, which letter is attached hereto as "Exhibit A", explaining in detail Isbrandtsen's objections to the proposed filing. The Memorandum referred to in said letter is incorporated and set forth below, as a part of this Brief.

What the So-Called "Alexander Committee Report" Really Is

In an effort to avoid the clear words of the statute, and the unqualified recommendations in *the only official Congressional Committee Reports*, the adherents of the exclusive-patronage contract/non-contract dual-rate system, including the Federal Maritime Board, have

long indulged in the subterfuge of placing all emphasis upon the printed proceedings conducted by the House Committee on Merchant Marine and Fisheries in 1912 and 1913. The account of these proceedings was published in four volumes prepared by Professor S. S. Huebner, the expert consultant to the Committee. The first three volumes constitute a summary of the evidence and testimony presented to the Committee, and the fourth volume prepared by Professor Huebner is a final summary of the data obtained. This compilation of data accompanied no draft of legislation, and only at the very end of volume IV did the Committee—or probably more exactly Chairman Alexander—submit ten pages of "recommendations" for legislation. No other parts of the four volumes were endorsed by the House Committee, or even any member thereof, because these volumes constituted merely a summary of the evidence prepared by the Committee's hired assistant, Professor Huebner.

There were only two Congressional Committee Reports accompanying the final Shipping Bill, H.R. 15455, 64th Congress, 1st Session, which bill became the Shipping Act of 1916. Neither the House Report (H. Rept. No. 659, 64th Cong., 1st Sess., May 9, 1916) nor the Senate Report (S. Rept. 689, 64th Cong., 1st Sess., July 19, 1916) contains any discussion whatsoever of any exclusive-patronage system employed by steamship conferences other than the exclusive-patronage deferred-rebate system which was outlawed by the Bill and the Act. Both of these Reports are rather short, and each Report contains the following sweeping recommendation concerning any exclusive-patronage re-

bating practice or the employment of preferential rates:

> "That rebating of freight rates to shippers be made illegal, and that, with due regard to the proper loading of the vessel and the tonnage available, discrimination between shippers or ports in the matter of rates and space accommodations be prohibited. In this connection, it is the belief of the committee that water carriers should be required to charge equal rates to all shippers irrespective of the volume of freight offered for shipment."

It is extraordinary that over the years the supporters of the exclusive-patronage system have erroneously referred to the entire assemblage of data presented to the House Committee during the Sixty-second Congress, *in 1912 and 1913,* which was summarized by a Committee staff member, as the so-called "Alexander Committee Report", ignoring in the process the *only two actual Committee Reports* that were printed and which accompanied legislation.

The actual status of this so-called, but misnamed, "Alexander Committee Report" completely refutes the attempts by the Board and the Conferences to elevate it to the position of the extreme authority, supreme even to the very words of the Shipping Act itself. These four volumes, consisting merely of an account of the House Committee *Investigation,* under the Chairmanship of Joshua W. Alexander of Missouri, *in the Sixty-second Congress,* were called, *"Proceedings of Committee on Merchant Marine and Fisheries*

in investigation of shipping combinations under H. Res. 587 (62nd Congress)". See *U. S. Catalogue of Public Documents of 63rd Cong.,* Vol. 12, p. 1782. On February 17, 1914, Representative Barnhart offered several resolutions to have certain documents printed (51 *Cong. Rec.* 3551). Among these resolutions were:

(1) 15,000 copies of "Hygiene of the Painter's Trade",
(2) 55,000 copies of "Rules of procedure in probate matters, adopted by the county judges of the five civilized Tribes portion of Oklahoma",
(3) 9,200 copies of an account of hearings on woman suffrage, and
(4) 4,540 copies of *volume 4* of the Alexander Committee Proceedings.

Specifically, the resolution offered by Mr. Barnhart was as follows (51 *Cong. Rec.* 3551, February 17, 1914):

"*Mr. Barnhart.* Mr. Speaker, I offer the following privileged resolution,

"The Clerk read as follows:

"'House resolution 402 (H. Rept. 217)

"'*Resolved,* That the Committee on the Merchant Marine and Fisheries be, and is hereby, authorized to have printed 4,540 copies of volume 4 of the *Proceedings of the Committee on the Merchant Marine and Fisheries in the investigation of shipping combinations,* under H. Res. 587 of the Sixty-second Congress, second session.

"'With the following committee amendment:
"'In line 3, strike the words "four thousand and five" (sic.) and insert the words "twenty-nine".'"

It should be noted that Representative Barnhart did not refer to Volume IV of the Committee "Proceedings", which was ordered printed, as a *Report* of the Committee. If it had been a Report of the Committee, it would have been printed in the normal course under the House Rules without any special resolution. Thereafter, *Volume IV of the Proceedings* was given a *House Document Number*, and while the title page of this volume was entitled "Report", there was the special notation, however, that it had been prepared by Professor S. S. Huebner. The *U. S. Catalogue of Public Documents of the 63rd Congress* (at p. 1782), after listing the "Proceedings of the Committee on Merchant Marine and Fisheries etc." has the following listing:

"———Same, with title, Report of Committee on Merchant Marine and Fisheries on steamship agreements and affiliations in American foreign and domestic trade, under H. Res. 587 (62nd Congress), *prepared by S. S. Huebner*, including recommendations of committee. 1914. XV No. 459 p. 5 pl. (H. doc. 805, 63d Cong. 2d sess.) In V. 154: 6751."

Although Volume IV of the House Committee Proceedings was referred to as a "Report", it is clear that it was not a Report of a Congressional Committee in the ordinary legislative sense. For example, H. R. Rept. No. 659, 64th Cong., 1st Sess. (the only *real*

Alexander Committee Report) starts out in the ordinary way of Congressional Committee Reports, *viz.*:

> "Mr. Alexander, from the Committee on the Merchant Marine and Fisheries, submitted the following:
>
> "REPORT
>
> "(To accompany H. R. 15455)"

H. R. Doc. 805, 63rd Cong., 2d Sess. (Volume IV of the Committee Proceedings), does not start out in this way, and of course it accompanied no legislation. This document does not state that it was *submitted* by Mr. Alexander and the Committee, or by either, although at the end of the document, J. W. Alexander, Chairman, did sign *only* the Committee "recommendations" as "Respectfully submitted".

Volume IV of the Committee Proceedings, which alone is reprinted as H. R. Doc. 805, 63rd Cong., 2d Sess., starts out with a "Prefatory Note", *signed only by "S. S. Huebner"*. This Prefatory Note" begins as follows:

> "The following report on 'Steamship Agreements and Affiliations in the Foreign and Domestic Trade' represents a *summary of the data* gathered by the Committee on the Merchant Marine and Fisheries in its investigation of steamship combinations under House Resolutions 425, introduced by Mr. Rufus Hardy of Texas, on February 24, 1912, and 587, introduced by Mr. J. W. Alexander of Missouri, Chairman, on June 18, 1912."

The "Prefatory Note" then goes on to explain the methods of procedure of the investigation and the sources of the data obtained.

In this prefatory note, at page 5 of H. R. Doc. 805, the following statement is made by Professor Huebner:

> "At the conclusion of the hearings, and in view of the contentions of the conference line representatives and *the reluctance of shippers to express their complaints openly for fear of retaliation,* the Committee decided, under promise of confidential treatment, to ascertain approximately the extent to which leading shippers indorsed the views of the conference line representatives."

Professor Huebner goes on to explain that the Committee sent out a circular letter to 2,000 shippers and received 300 replies, which replies were summarized and classified "in volume 2 (pp. 1397-1408) of the Committee's Proceedings".

At the end of the Prefatory note (page 7 of the H. R. Doc. 805), there is a brief section entitled "Plan and Purpose of the Report", which states in part as follows:

> "The following pages represent the bringing together in the form of a classified summary, of all the essential facts obtained from all sources just enumerated. In view, however, of the constant changes occurring in the relations between at least some of the hundreds of steamship lines involved

in the investigation, it should be noted that *this report presents the facts as they existed at the close of the hearings* and the receipt by the Committee of the answers to the Schedules of Inquiries addressed to the steamship lines, the railroads, and our diplomatic and consular representatives."

In view of these remarks, therefore, and from a study of the so-called "Report" itself, it is clear that this document is merely intended to be a *"summary of all the essential facts obtained" by the Committee,* which summary was prepared by a Committee staff member, Professor Huebner. Nowhere in the summary of the evidence, of course, is there contained any *recommendation of the Committee,* and furthermore, there is no indication that the summary was endorsed by any committee member. Such a summary of facts before a Congressional Committee could hardly constitute valid legislative history.

H. R. Doc. 805 contains 424 pages, not including the index. The "summary" of the evidence prepared by Professor Huebner covers 412 pages. The "recommendations" of the Committee, separated from Professor Huebner's summary by a blank page, begin on page *415* and cover only ten pages. *These recommendations are the only part of this entire document containing any notation that they are "submitted" by the committee or any member thereof.* As contrasted with the first part of the document, containing Professor Huebner's "summary" of the evidence, the Commit-

tee's recommendations are separated and start out with the following prefatory remark, after referring to the authorizing resolution:

> "In compliance with the directions of the resolution relating to legislation, the Committee submits the following recommendations:"

It is true that the recommendations of the Committee do refer to Professor Huebner's summary of the evidence as a "report", but it is also clear that the word was not used to mean a legislative report. References to Professor Huebner's Report are merely made in the nature of references to a record before the Committee. The Committee, in referring to Professor Huebner's Report, did not make any reference such as

> the foregoing committee report,

or to the

> accompanying report of your committee,

the usual references employed when a committee is referring to its own report, but on the contrary; all of the references are given in the following form:

> ". . . see pp.—— to —— of the foregoing report."

It is not surprising that the Committee did not specifically endorse Professor Huebner's "summary" of the evidence, as contained in *his* report, because the hearings were conducted by the Committee on the Merchant Marine and Fisheries of the *Sixty-second* Congress, as explained on the inside of the Title Page

of H. R. Doc. 805, but Volume IV of the Committee Proceedings (H. R. Doc. 805) was prepared and printed in the second session of the *Sixty-third Congress*. Of the original nineteen (19) members of the Committee, when the hearings were held and the evidence was compiled, only Chairman Alexander and five (5) other Congressmen were holdovers on the twenty-one (21) man committee during the 63rd Congress. Fifteen (15) of the twenty-one (21) members of the House Committee in the Sixty-third Congress, therefore, had not been members of that Committee when the hearings were conducted, upon which Professor Huebner prepared his "summary" of the evidence. At the time that the House Report on the final Shipping Bill was presented (H. Rept. No. 659, 64th Cong., 1st Sess., accompanying H. R. 15455, May 9, 1916), there had been a further attrition of original Committee membership. In other words, from the time of the hearings by the House Committee, during the Sixty-second Congress, until the passage of H. R. 15455, during the Sixty-fourth Congress, there had been almost a complete turnover in Committee membership.

It is fantastic, under these circumstances, that the Board and the Conference should continuously persist in the delusion that the "summary" of *evidence, prepared by Professor Huebner* and contained in the Committee Proceedings held during the *Sixty-second Congress*, constitutes the "Alexander Committtee Report". Much of the evidence, so summarized by Professor Huebner, as Professor Huebner himself admitted, constituted merely the self-serving statements of

the Conferences' own witnesses. There was great difficulty in obtaining shipper testimony, because of the shippers' "fear of retaliation".

Admittedly some of the "summary" of evidence in Volume IV of Committee Proceedings contained in the original Committee Proceedings may have been considered in drafting the final legislation. Certainly, the Committee's original "recommendations" of ten pages, submitted by the Committee at the end of Volume IV (H. R. Doc. 805) were important, and these recommendations were reprinted in both the House and Senate Reports accompanying the final Shipping Bill; but these specific "recommendations" of the Committee are overlooked by the Board and Conferences, and all emphasis is placed rather on Professor Huebner's "summary" of *evidence*.

Other hearings were held on the Shipping Bills, after the original House Committee Proceedings. The original Shipping Bill, H.R. 17328, was not introduced until January 29, 1915, approximately a year after the original Committee Proceedings were prepared, and hearings were held from February 10 to March 9, 1915 (53 *Cong. Rec.* 8074). Additional hearings were held between April 13 and 22, 1915. Various other shipping bills were subsequently introduced and considered H.R. 18518, 63rd Cong., H.R. 3728, 63rd Cong.; H.R. 450, 64th Cong.; H.R. 10500, 64th Cong; H.R. 14337, 64th Cong.; H.R. 15455, 64th Cong. (The final Shipping Bill); and H.R. 15565, 64th Cong. Hearings on H. R. 14337, entitled "Reg-

ulatory Features of Shipping Bill", were held before the House Committee between April 13 and 22, 1916, at which hearings Professor Emory R. Johnson, one of the drafters of the bill testified. When the final Shipping Bill was debated on the floor of the Senate, Senator Cummins expressed great concern that ordinary rebates "just as obnoxious to common sense and good reason" as deferred rebates might be permitted. Senator Fletcher explained that such a result would not occur and quoted the remarks of Professor Johnson before the House Committee, in his testimony on H.R. 14337, on April 13, 1914 (53 *Cong. Rec.* 12449).

There is no support anywhere in this entire legislative history for the Board and Conference position. The only flimsy basis for their arguments is manufactured from a perversion of language appearing in the *"summary" of evidence, prepared by Professor Huebner.* All subsequent evidence collected by the Committee that drafted the bill, the actual Committee Recommendations, and the only real Congressional Committee Reports are ignored. The Board and the Conference have attempted to lend legitimacy to their arguments by referring to the entire four volumes of the original House Committee Proceedings, containing a *"summary" of evidence* prepared by Professor Huebner, as "the Alexander Committee Report", and have even erroneously referred to this entire four-volume assemblage as H.R. Doc. 805, even though only volume IV was so printed.

There is no question that the members of the Congress, as well as the members of the House Committee,

considered Professor Huebner's four volume Report as merely a "summary" of evidence, as Professor Huebner himself had characterized it. In a hearing on the "Regulatory Features of Shipping Bill" (H.R. 14337) held before the Alexander Committee *on April 22, 1916*, Representative Rufus Hardy of Texas, a former Judge and the then ranking majority member of the Committee, referred to the now so-called "Alexander Committee Report" as "the *evidence* that was taken before this Committee consisting of *four* volumes". (page 174 of Hearings on H.R. 14337, 64th Cong., 1st sess.)

In summary, no part of the four volumes of House Committee Proceedings, erroneously called by the Board and the Conference, "the Alexander Committee Report", is, in any sense, a legislative *report*, and while the last ten (10) pages of Volumes IV, the "recommendations", could be considered as the utterances or suggestions of the Committee, or perhaps rather its Chairman, the balance of the four (4) volumes are not in any way entitled to be characterized as reliable or valid "legislative history" or to be called to the attention of any Court as such.

Conclusion

For the reasons set forth above, Respondent, Isbrandtsen Company, Inc., respectfully urges this Court to disregard the expurgated version of the "Proceedings of Committee on Merchant Marine and Fisheries in investigation of shipping combinations under

H.Res. 587, 62nd Congress", which material has been filed as a "Joint Appendix" to the Briefs of the Petitioner, Federal Maritime Board, and the Respondents, United States and the Secretary of Agriculture.

Respectfully submitted,

JOHN J. O'CONNOR,
Attorney for Respondent,
Isbrandtsen Company, Inc.
Washington Building,
Washington 5, D. C.

WASHINGTON, D. C.
NOVEMBER 7, 1957.

Certificate

I, John J. O'Connor, Counsel for Isbrandtsen Company, Inc., and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 13th day of November, 1957, I served copies of the foregoing Brief on counsel for all parties of record by mailing copies to their offices in duly addressed envelopes with postage prepaid, or by delivery to them in person.

JOHN J. O'CONNOR.

APPENDIX A

LAW OFFICES
JOHN J. O'CONNOR

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WASHINGTON BUILDING
Washington 5, D. C.
REpublic 7-1080

October 23, 1957.

WARNER W. GARDNER, ESQ.,
734 15th St., N. W.
Washington 5, D. C.

Re: *Federal Maritime Board, Petitioner v. Isbrandtsen, United States, and Secretary of Agriculture, Respondents (No. 73) and Japan-Atlantic & Gulf Frt. Conf., Petitioner, v. United States, Federal Maritime Board, Isbrandtsen, and Secretary of Agriculture, Respondents (No. 74)*

Proposal of Board's Special Counsel to file with the Court certain "Extracts" from "so-called Alexander Report".

Dear Mr. GARDNER:

I have your letter of October 21, 1957, addressed to Mr. Elkan Turk, attorney for the Conference, and to me, as attorney for Isbrandtsen, with copies to the Solicitor General of the United States and to Mr. E. Robert Seaver, General Counsel of the Federal Maritime Board, concerning your plan to file with the Supreme Court your selected "extracts" from the "so-called Alexander Report". *At the outset, I inform you that I will object most strenuously to any such improper and unprecedented filing.*

The caption of your letter of October 21, 1957, setting forth these two dockets, is abbreviated so as to show Isbrandtsen as the only Respondent in Docket No. 73 and the United States as the only Respondent in Docket No. 74. Actually, there are five (5) parties to these proceedings.

These proceedings are now before this Court on a Joint Appendix, which constitutes the entire Record before the Court, which Joint Appendix was laboriously worked out in the Court of Appeals, below, before you were retained by the Board as its "Special Counsel". I cannot comprehend how you can conceivably claim, at this late date, any right to expand this "Joint Appendix", after briefs have been filed by all the parties, and without the consent of *all* of the parties *including private parties*. You state in your above-mentioned letter of October 14, 1957, that this material—which is no part of the "Record" in the proceedings—is to be submitted merely as a "Joint Appendix to the briefs of the two Government agencies". I am unaware of the demotion of the Departments of Justice and Agriculture (which Department is also a Respondent in the Proceedings) to the status of "Government agencies", and I am sure they will be surprised to learn of your self-assumed demotion.

In any event, I point out that the time for all parties to file their briefs, and any appendices thereto, has expired. Isbrandtsen's brief, as a respondent in each proceeding, has been filed, and we have replied to the briefs of the Board and the Conference. We would, of course, have been entitled to reply to any appendix which you had attached to your brief, and we certainly would have replied to any attempt to submit "extracts" from a "summary" of *evidence* compiled by a Commit-

tee staff member, which you mistakenly call the "Alexander Committee *Report*". Furthermore, I do not believe that your maneuver of presenting such an appendix, *after* briefs have been filed, could be successful in foreclosing my formal response thereto. The only way that such a "Joint Appendix" could be filed, at this date, that I know of, would be with the consent of *all* of the parties, and you have known for some time that my consent has been refused.

Undoubtedly you recall your telephone call to me, with reference to your proposed presentation of your "extracts" from the "so-called Alexander Report" to the Supreme Court as a "Joint Appendix". As I informed you, I object to any such presentation in the form of a Joint Appendix. Fundamentally, I object to any expurgated version of any public *document* being presented to the Supreme Court in an effort to spoon feed to the Court material which the Court can well read in its entirety in the Court's library. I should consider such an effort an affront to the Court of the same sort as if a party should attempt to include selected extracts from Judicial decisions *in any Appendix*. More importantly, however, the document which you represent as the "so-called Alexander *Report*" is in reality *not in any sense a Report of a Congressional Committee*, and, even though I am convinced that this document lends no support to your position, I would never consent to have such a mere document dignified as an important and relevant authority in this case. As I have explained in the attached memorandum, the document from which you take your extracts, was only a "summary" of the *evidence*, presented to a House Committee before any legislation was drafted or proposed, and *only volume IV* thereof was printed *by spe-*

cial permission of the House of Representatives as H. Doc. No. 805, 63d Cong., 2d Sess., despite the erroneous citation on the title page of your "extracts" giving that citation for all *four* volumes.

You have also sent me a copy of your letter of October 14, 1957, addressed to the Solicitor General, in which you refer to "telephone conversations" with Mr. Pollock, an Assistant Solicitor General, and you also enclose a copy of your "extracts" from "the so-called Alexander Report." Of course, you must be aware that all Briefs, now filed by the Conference, the Board, Isbrandtsen and the Departments of Justice and Agriculture, already contain many references to this so-called "Report", affording the Court whatever "help" it may need in analyzing the relevancy and materiality, if any, of this misrepresented document. The function of briefs to the Court, as far as I know, is to summarize the arguments of the parties, supplying supporting references and citations which *the Court can check* in as much detail as it may wish. I cannot appreciate your alleged concern, therefore, for the Court's labors, and your transparent suggestion that these "extracts", from a public document available in the libraries, will "help" the Court without any further necessity of the Court to resort to its "library stacks", a travail from which you apparently assume your "extracts" will relieve the nine Justices and their many assistants.

In your said letter to the Solicitor General you also state that 102 typewritten pages of "extracts" which you enclose are those remaining after you have stricken "33 pages" which you had proposed to insert. Naturally, one can assume that your expurgatory selection was done on the basis of those pages which you consider

most favorable to your position, and that the some two thousand pages which you have not selected, as well as the 33 pages you have stricken, would not be favorable to your new client. You state also that copies of your "extracts" will be dispatched "to counsel for the *private* parties, Messrs. O'Connor and Turk, for their information". While I acknowledge your kindly gesture, it is of no assistance to me, I can assure you, because I am still able to read public documents in their unexpurgated form in the library, as I know the Court can do. Your statement, furthermore, is the first time I have ever seen it contended, in writing, at least, that "Goverment agencies" (which normally come into cases of this sort only as *amici curiae*) have any higher standing or greater privileges before the Supreme Court of the United States than "private parties", who are the real parties in interest in the proceeding.

I must accept some of the blame myself, for not sooner completely exploding the three-decade old myth, about this so-called "Alexander Report" being worthwhile "legislative history". My several previous briefs, however, relating to the exclusive-patronage system, will corroborate my present attitude as being one of long standing.

Just recently, I have gone to some further trouble to establish conclusively that this "so-called Alexander Report", from which you extract selected excerpts, *is not a Congressional Committee Report*. The entire four volumes of Committee Proceedings were compiled by a Staff Member hired by the Committee, except possibly for ten pages of "recommendations" at the very end of the *fourth* volume. These four volumes, other than the recommendations, were described by the writer,

Professor S. S. Huebner, as "*a summary of the data gathered by the committee*". The fourth volume of Committee Proceedings was published as H. Doc. 805, 63d Cong., 2d Sess., only with special authorization of the House of Representatives, *which authorization would not have been necessary if the document had been a legislative report.* Furthermore, this "*summary*" *of evidence* compiled by Professor Huebner, which you erroneously refer to as the "Alexander Report", was not specifically endorsed by any member of the Committee, which is not surprising because when volume IV, was printed in 1914, fifteen (15) of the twenty-one (21) members of the then House Committee had not been members of that Committee when the hearings were conducted. The "summary" of Committee proceedings should properly be called "*Professor Huebner's Report*".

There were in fact only two actual Congressional Committee *Reports*, those accompanying the final Shipping Bill, H.R. 15455, *viz.*, House Report No. 659, 64th Cong., 1st Sess., May 9, 1916 (the *real* Alexander Committee Report), and Senate Report No. 689, 64th Cong., 1st Sess., July 19, 1916, *which Reports were printed without any special authorization.* In order to be "helpful" to you, and perhaps to the Court as well, I have prepared a memorandum, attached hereto, which explains the real status of *Professor Huebner's Report*, which you erroneously call the "Alexander Report", as well as the facts concerning the really relevant "legislative history" of the Shipping Act. I am not so presumptuous as to believe that the Court requires my assistance in extracting portions of this real legislative history. Rather, I am fully content and unafraid to have the Justices read these matters, in their entirety.

if they should desire, or to check the references which I have made.

I am giving you my reactions to your attempted presentation of "extracts" from a document that has very little standing as any legislative history of the Shipping Act—even if such exploration of "legislative history" were proper, which I believe it is not—in order to save my Government any further expense of additional research and legal fees in discovering and segregating these "extracts" and in having them printed in great number. I have attempted to reach Mr. Pollock, by telephone, to convey my objections to him (which attitude I had already stated to you), but I learned that he was at home, ill in bed.

Yours very truly,

JOHN J. O'CONNOR,
Attorney for Respondent,
Isbrandtsen Company, Inc.,
Respondent in Dockets 73 and 74.

Copies to Clerk of Court and Counsel for all parties and generally.

(7770-1)

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Nos. 73 and 74

In the Supreme Court of the United States

OCTOBER TERM, 1957

FEDERAL MARITIME BOARD, PETITIONER

v.

ISBRANDTSEN COMPANY, INC., ET AL.

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE SECRETARY OF AGRICULTURE

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 73

FEDERAL MARITIME BOARD, PETITIONER

v.

ISBRANDTSEN COMPANY, INC., ET AL.

No. 74

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE SECRETARY OF AGRICULTURE

OPINIONS BELOW

The majority and concurring opinions of the Court of Appeals (R. 237–248) are reported in 239 F. 2d 933.

JURISDICTION

The judgment of the Court of Appeals was entered on November 9, 1956 (R. 248). The petitions for writs

of certiorari were filed on February 1, 1957, and were granted on March 25, 1957 (R. 250). The jurisdiction of this Court rests on 5 U. S. C. 1040 and 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the "dual-rate" system of ocean freight rates, under which shippers who refuse to sign exclusive patronage agreements with members of an association of carriers pay substantially higher rates for the identical transportation service than shippers who sign such agreements, is *per se* illegal under the Shipping Act of 1916 and therefore beyond the power of the Federal Maritime Board to approve under Section 15 of that Act.

STATUTE INVOLVED

Pertinent provisions of the Shipping Act, 1916, 39 Stat. 728, as amended, 46 U. S. C. 801, *et seq.*, are set forth in the Appendix, *infra*, pp. 62–65.

STATEMENT

The issue before the Court is the validity of an order of the Federal Maritime Board (petitioner in No. 73) authorizing the Japan-Atlantic and Gulf Freight Conference ("the Conference"), (a petitioner in No. 74) to institute a "dual-rate" system, under which shippers who refuse to sign exclusive patronage contracts with carrier members of the Conference are charged 9½% more for the identical transportation service than shippers who sign such contracts. Respondents United States and the Secretary of Agriculture contend, as the court below held, that the dual-rate

system is illegal under the Shipping Act, 1916, and that the Board therefore erred in approving it.

Under the prehearing stipulation in the Court of Appeals, the validity of the Board's order is to be determined "on the basis of the facts * * * as found by the Board" (R. 232, 234). The following statement is based on those facts.

1. THE FACTUAL BACKGROUND

A. THE OPERATIONS OF THE CONFERENCE IN THE JAPAN-ATLANTIC TRADE

The Conference is a voluntary association of 17 ocean steamship lines operating between Japan, Korea, and Okinawa, and the Gulf and Atlantic Coasts of North America (R. 23). Five of these lines are American, eight are Japanese, and four are of other nations (R. 23, n. 4). The Conference and its predecessors have operated since 1922 under successive conference agreements, the first of which was approved by the Board in 1926 (R. 23).[1] The current agreement was approved in 1934 (R. 24).

Private steamship operations between Japan and the United States ceased in December 1941 following the outbreak of war between the two countries (R. 24). Such trade was resumed in March 1946 to carry

[1] The Federal Maritime Board and its predecessors are hereinafter sometimes collectively called the "Board." Its predecessors were the United States Shipping Board (1916 to 1933); Department of Commerce United States Shipping Board Bureau (1933 to 1936); and United States Maritime Commission (1936 to 1950). See *Far East Conference v. United States*, 342 U. S. 570, 571, note 2.

cargoes of the Allied occupying powers (R. 24). Although the Conference continued nominally to exist during the war, it was formally re-established in Japan in December 1948 (R. 24). Japanese lines did not reenter the trade until 1951 and 1952 (R. 27–28).

The current Conference agreement does not authorize the use of a dual-rate system (R. 24). From 1928 to 1941, however, the Conference employed such a system for various commodities (R. 24). During that period, due "at least in part" to that system, the Conference had no direct liner competition and little tramp ship competition (R. 25).

B. THE COMPETITIVE RELATIONSHIP BETWEEN ISBRANDTSEN AND THE CONFERENCE

Petitioner Isbrandtsen has been the sole non-conference line which has maintained a berth service in the post-war Japan-Atlantic trade (R. 25). Since early 1949, Isbrandtsen has operated an approximately fortnightly service from Japan to the United States as part of its eastbound round-the-world service (R. 25). None of Isbrandtsen's vessels is equipped with refrigerated space or special silkrooms, as are many of the Conference vessels (R. 25). Although Conference membership is open to any common carrier operating, or intending to operate, regularly in the trade, Isbrandtsen "as a matter of policy" has declined to join the Conference (R. 25.)

The following table shows the comparative sailings and carryings of Isbrandtsen and the Conference lines in the trade from January 1949 to July 1953 (R. 27):

Calendar year	Number of sailings			Cargo carried (revenue tons)			Average carryings per sailings		Percentage of total liner cargo	
	Isbrandtsen	Conf.	Total	Isbrandtsen	Conf.	Total	Isbrandtsen	Conf.	Isbrandtsen	Conf.
1949	6	103	109	18,099	135,635	153,734	3,016	1,317	12	88
1950	21	137	158	120,381	229,829	350,210	5,780	1,678	34	66
1951	21	174	195	93,450	219,343	312,793	4,450	1,261	30	70
1952	24	221	245	98,834	281,308	380,142	4,118	1,273	26	74
1953 — 6 months	12	153	165	37,308	189,503	226,811	3,109	1,239	16	84

The trade from Japan to the Atlantic Coast of the United States is at present overtonnaged, and both Isbrandtsen and Conference vessels have "substantial free and usable space" after completion of loading in Japan (R. 28).[2] Total sailings in the trade rose from 109 in 1949 to more than 300 in 1953 (R. 27). The reentry of the Japanese lines in 1951 and 1952 "greatly contributed" to this excessive tonnage. For the years 1951, 1952, and the first 6 months of 1953, the Japanese lines carried approximately 15%, 49%, and 66%, respectively, of the trade's total liner cargo; during the same period United States flag lines (including Isbrandtsen, but excluding two Conference lines) carried 46%, 34%, and 21% of the trade, respectively (R. 27–28).[3]

C. THE TRADE RATE STRUCTURE AND THE RATE WAR

Between 1947 and March 12, 1953, Isbrandtsen's rates, on the average, were approximately 10% below

[2] Most of the Conference vessels commence loading inbound cargo for the United States in the Philippines, proceed to Hong Kong, and complete loading in Japan; they discharge cargo at Pacific, Gulf, and Atlantic ports of the United States (R. 25–26). The amount of cargo which moves from Japan to the Gulf ports is small in comparison to cargo moving to Atlantic ports (R. 26).

[3] In 1950 they carried 53% of the trade (R. 28).

the corresponding Conference tariff rates (R. 29). "As a matter of policy, Isbrandtsen quotes rates lower than those of its competitors, but never knowingly quotes a non-compensatory rate" (R. 29). Prior to the outbreak of the rate war in 1953, both Isbrandtsen's and the Conference's rates were "stable, *i. e.*, constant for relatively long periods of time," due in large part to the "reluctance" of the Conference to reduce its rates to Isbrandtsen's level (R. 29). The level of Conference rates "gradually increased" between 1947 and November 15, 1952, and Conference rate increases were followed by Isbrandtsen increases (R. 28–29). In November 1952 the Conference announced a 10% reduction in rates, and Isbrandtsen announced that its new rates would be 10% lower than the new Conference rates (R. 29).

Most shippers in the trade are "primarily interested in low, uniform and stable freight rates" (R. 29). While Japanese shippers tend to favor Japanese lines, this tendency is limited "to a large extent" by their desire for lower rates, as evidenced by the volume which Isbrandtsen has carried in the trade (R. 29–30). Various shippers considered that the level of Conference rates was "too high" prior to March 12, 1953 (R. 30).

At a special meeting held on March 12, 1953, the Conference voted to "open" Conference tariff rates on 10 major commodities moving in the trade, that is, to release Conference members from their obligation to observe the published tariffs (R. 30). This step was directed at non-conference competition and the rumored rebating by member lines; it was also

"hoped" that the "rate war would lead to Isbrandtsen's joining the Conference or to the institution of the dual rate system or other system" (R. 31). Since that meeting, the Conference has opened rates on most of the commodities that move in substantial volume in the trade, except for refrigerated cargo (R. 30) which Isbrandtsen does not carry (R. 25).

After March 12, 1953, the level of rates dropped, first to about 80% and later to about 30% to 40% of the pre-March 12 level. On a "fairly large number of items", some lines have charged rates as low as $6.00–$6.50 per ton, as against handling costs alone of approximately $8.50 per ton (R. 31). Isbrandtsen attempted to keep on a competitive basis in the rate war until mid-May 1953, when it set minimum rates of first $15.00 and later $12.00 per ton to the Atlantic Coast. Such minimum rates "adversely affected" Isbrandtsen's competitive position in the trade (R. 31). Effective July 15, 1953, Isbrandtsen set its rates at 50% of the pre-March 12 rates, and since that date it "has carried little cargo in the trade" (R. 31). "Many Japanese shippers have requested the conference to close rates and to end the rate war" (R. 32).

2. THE BOARD PROCEEDINGS

On December 24, 1952, the Conference filed with the Board, pursuant to the latter's General Order 76,[4]

[4] Section 236.3 of that order, 17 F. R. 10175, 46 C. F. R. 236.3, requires steamship conferences proposing to establish dual rates to file with the Board at least 30 days prior to the initiation of such rates a statement containing: (1) the amount of the differential between the contract and non-contract rates; (2) the effective date of such rates; (3) the reasons for the use of the dual-rate

a statement proposing to initiate 30 days thereafter a dual-rate system in the Japan-Atlantic trade (R. 19–20). Under the proposed system, shippers who refused to sign an exclusive patronage contract with the Conference would be charged rates for the same transportation service 9½% higher than the rates charged shippers who signed such contracts (R. 20). The proposed contract provided that a signing shipper who patronized a non-conference carrier would incur "liquidated damage" equal to 50% of the contract rate on the shipment (R. 36). The contract would be for an indefinite period, terminable by either party on three months notice (R. 35). Although the Conference members agreed "to maintain a shipping service adequate to meet the reasonable requirements of the trade," they did not "agree to respond in damages in the event of any inadequacy of service" (R. 36).[5]

Protests against the proposed dual-rate system were filed by Isbrandtsen and by the Department of Justice (R. 20), and the Department of Agriculture intervened in opposition to the proposal (R. 22).[6] The

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system in the particular trade involved, and the basis for the differential between the rates; and (4) copies of the form of all contracts pertaining thereto.

[5] However, a shipper may secure space elsewhere if, upon application, he is not notified within three days of the availability of space on Conference vessels within the following 15 days (R. 36).

[6] The Secretary of Agriculture intervened before the Board to represent agricultural interests in obtaining equitable transportation rates and service for shipments of agricultural products, and to represent the Department of Agriculture's direct interest as one of the largest agricultural shippers in the world. Under Section 203 (j) of the Agricultural Marketing Act of 1946 (7 U. S. C. 1622 (j)), the Secretary is authorized and directed to assist in

Board set the proposal for hearing, but refused to suspend operation of the system pending the hearing, as the protestants had requested (R. 20–21). On petition for review filed by Isbrandtsen, the court below held that Section 15 of the Act required the Board to approve the dual-rate system before it could be initiated, and enjoined the Conference from putting the system into operation until and unless it had been so approved. *Isbrandtsen Co.* v. *United States, et al.*, 211 F. 2d 51 (C. A. D. C.), certiorari denied, 347 U. S. 990.

Extensive hearings were held before an examiner and, after further administrative proceedings, the Board on December 14, 1955, issued its Report (R. 19–69) and Order (R. 73–76) approving (effective

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obtaining equitable and reasonable transportation rates and services for agricultural products by making complaint to the Federal Maritime Board and to other federal and state transportation regulatory bodies. Cf. also Section 201 of the Agricultural Adjustment Act of 1938, 7 U. S. C. 1291 (a) and (b), which authorizes the Secretary to participate in rate proceedings before the Interstate Commerce Commission relating to the transportation of farm products. The Department of Agriculture owns large quantities of farm products, substantial parts of which have been and will continue to be exported via ocean-going vessels.

The Secretary has also intervened in a number of other Board proceedings in which the validity of dual-rate systems has been challenged. The Secretary's interest is primarily in the legality of the dual-rate system and its interference with the free flow of agricultural exports. The total value of United States Agricultural exports for the twelve months beginning July 1, 1955, was 3.492 billion dollars. Foreign Agricultural Trade, published by United States Department of Agriculture, Foreign Agricultural Service (January 1957), p. 41.

January 1, 1956) the Conference application to institute the dual-rate system. The Board held (1) that the system "is, in itself, lawful, and does not require our disapproval unless, under the facts adduced in a particular case," it would be unjustly discriminatory and unfair as between shippers, carriers, etc., would operate to the detriment of the commerce of the United States, or would be in violation of the Act (R. 60); and (2) that the system's "prima facie discrimination against shippers and the increased tendency toward monopoly" were outweighed by its "foreseeable advantages" (primarily the stability of rates and service which it would produce) (R. 67), and that its employment therefore was reasonable because it was "a necessary competitive measure to offset the effect of non-conference competition in this trade" (R. 60).

The Board rejected the contention that the system is unlawful under Section 14, Third, of the Act, which prohibits any carrier from retaliating against any shipper by refusing available space or resorting to "other discriminating or unfair methods, because such shipper has patronized any other carrier * * * or for any other reason" (R. 37-60). It stated (R. 58) that the higher rate charged a shipper who refuses to sign an exclusive patronage contract is not "charged as a retaliation for 'patronizing any other carrier' * * * [but] because the shipper does not sign the contract, regardless of whether or not he patronizes any other carrier." Further, it held (R. 58) that Section 14,

Third, does not prohibit all discriminations, but only "unjust" ones, and that the "prima facie discrimination against shippers inherent in dual rate systems" (R. 59) is not "unjust" where, as here, it is a "necessary competitive measure to offset the effect of non-conference competition" in the trade (R. 60).[7]

3. THE DECISION OF THE COURT OF APPEALS[8]

The Court of Appeals set aside the Board's order on the ground that the dual-rate system constitutes a form of retaliatory discrimination against shippers in violation of Section 14, Third.

There were two opinions, in both of which all mem-

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[7] The Board stated (R. 61–62) that the dual-rate system, "by creating a basic core of cargo on which the conference can rely for the period of the contracts, will eliminate, for that period, the pressure on conference lines to reduce rates to meet Isbrandtsen's lower rate competition and will thereby create greater stability of rates and service, facilitate forward trading by shippers, and decrease the threat of rate wars." It also held (R. 62) that the 9½% differential between the contract and non-contract rates was, with certain exceptions, reasonable in relation to its probable effect on shippers and on the competitive position of Isbrandtsen. It concluded (R. 62) that, as to commodities capable of being carried by both Isbrandtsen and Conference vessels, the spread was "large enough to furnish protection to the conference lines against inducements to shippers offered by Isbrandtsen and small enough to enable Isbrandtsen to remain competitive with the conference." The Board found it "probable" that Isbrandtsen will retain 10% or more of the cargo moving in the trade as against the 26% which it carried in 1952 (R. 62), and stated (R. 62) that Isbrandtsen's 10% would be "an equitable share of the trade."

[8] The United States (a statutory respondent below) and the Secretary of Agriculture (an intervenor below) both supported Isbrandtsen in challenging the Board's order.

bers of the panel concurred (R. 245, 246). In the principal opinion (R. 238–246), written by Judge Fahy, the court ruled (R. 242) that, although the higher rate charged to non-signers of the exclusive patronage agreements was "in terms" for failure to enter into such agreement, "in reality" it was for actually shipping via a non-conference carrier; that the provision for liquidated damages for breach of the agreement is "part and parcel of the dual-rate system and gives color to the whole"; and that both of these provisions "come within a fair meaning of retaliation." The court pointed out (*ibid.*) that Section 14, Third, applies "not only to retaliation for shipping by another carrier but for 'any other reason,' which would include failure to enter into the exclusive contract arrangement." It held (R. 243) that under these circumstances "the charge of a higher rate for the same service and facilities, or the imposition of the liquidated damages, is prima facie discriminatory," and that Section 14, Third, provides that "retaliation * * * may not be resorted to when discriminatory" (R. 244). The court further held (R. 244–245) that adjudicated cases had not decided the legality of the system, and it found no support in the legislative history of the Act for the Board's contention that Congress implicitly had authorized the system.

Judge Washington's concurring opinion (R. 246–248) dealt primarily with the Board's contention that Congress was familiar with dual-rate agreements when it enacted the Shipping Act, and that its failure in terms to outlaw such agreements, while flatly prohibiting such other anticompetitive practices as de-

ferred rebates and fighting ships, demonstrates an implied Congressional endorsement of this device (R. 247).[9] Rejecting this contention, the opinion states (*ibid.*) that the contracts which Congress considered were "bona fide requirements contracts" and "were materially different from the contracts before us now," and that "[i]mplied congressional approval of a bona fide requirements contract is no basis for exempting the contracts in this case from the plain meaning of 'discriminating or unfair methods'" (R. 248).

SUMMARY OF ARGUMENT

Section 15 of the Shipping Act prohibits, unless approved by the Board, agreements among ocean carriers fixing rates, giving special rates, or preventing or destroying competition; and provides for Board disapproval of any agreement that is "unjustly discriminatory * * * as between * * * shippers * * * or * * * in violation of" the Act. Agreements approved by the Board are exempted from the antitrust laws. Section 14 of the Act makes it illegal for any carrier to give any shipper a "deferred rebate" (Subsection First), to use a "fighting ship" (Subsection Second), or to "[r]etaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such

[9] Judge Washington also stated (R. 246) that the dual-rate system constituted "retaliation" under Section 14, Third, because "in actual practice * * * [it] is being used to penalize a shipper because he has patronized another carrier, or at least reserved the right to do so."

shipper has patronized any other carrier * * * or for any other reason" (Subsection Third).

The court below held that the Conference's dual-rate system, under which a shipper who refuses to sign an exclusive patronage contract with the conference is charged 9½% more for the same transportation service than a shipper who signs such agreement, and liquidated damages of 50% are imposed upon a shipper who patronizes a competitor in violation of such agreement, constitutes retaliatory discrimination under Section 14, Third. We submit that this holding is correct, and that the dual-rate system also violates the prohibition in Section 14, Third, against "unfair" methods.

A. 1. Since there is no difference in the cost or value of services rendered to two shippers, one of whom signs an exclusive patronage contract and the other of whom does not, the 9½% arbitrary differential plainly is retaliation against a non-signing shipper "because such shipper has patronized any other carrier."

The Board's contention that Section 14, Third, prohibits only retaliation because of actual patronage of competitors, and not because of refusal to agree not to do so, attaches undue significance to the mere form of the transaction. Furthermore, the Act prohibits retaliation not only for patronizing another carrier but also "for any other reason."

The Board's construction would open the door to serious evasion of the Act. Under its view that only retaliation because of actual patronage of a competitor is forbidden, a carrier could refuse available

space because a shipper has refused to sign an exclusive patronage agreement, even though the statute flatly prohibits space refusal for patronizing other carriers.

2. The dual-rate system, under which two different rates are charged for the same transportation system, violates the prohibition in Section 14, Third, against resorting to "other discriminating * * * methods." The statute cannot be limited, as the Board construes it, as condemning only "unjust" discrimination. It broadly condemns all discrimination based on a shipper's refusal to give all his business to particular carriers. The legislative history of the Act indicates that the unqualified prohibition of all discriminatory methods was deliberate, not inadvertent, and that Congress intended to prohibit *any*, and not merely "unjust," discrimination.

But assuming *arguendo* that Section 14, Third, prohibits only "unjust" discrimination, that would not legalize the dual-rate system. A differential in rates may be justified under a statute prohibiting "unjust" discrimination only if it has some reasonable relation to the amount of differences in services provided. Here, however, there is not even a pretense of difference in service. Accordingly, by any known standard of transportation law, the differential must be regarded as wholly arbitrary and therefore "unjustly" discriminatory.

3. The legislative history of the Act does not support petitioners' contention that Section 14, Third, prohibits only retaliatory discrimination with respect to services, and not with respect to rates. The pur-

pose of the Shipping Act—to prevent conferences from using their concerted economic power to drive independent carriers out of the field—would be seriously impeded if Section 14, Third, were given such a restrictive interpretation. Nor is such an interpretation required under the *ejusdem generis* rule relied upon by the petitioners.

B. The dual-rate system is also unlawful under Section 14, Third, as an "unfair" method used against independent shippers. Congress deemed it unfair to refuse available space to a shipper because he has patronized another carrier; it is equally unfair to offer the space only at a penalty rate. Similarly, if deferred rebates and fighting ships are unfair, it is also unfair to impose substantial penalties in the form of increased rates in order to coerce shippers to abandon their freedom to patronize carriers of their choice.

C. The legislative history of the Act does not reflect any implied Congressional approval of the dual-rate system. Instead, it shows a purpose to outlaw all discriminatory practices by ocean carriers based on shippers' refusals to patronize such carriers exclusively.

1. Contrary to petitioners' contention, the "joint contracts made by the conference as a whole" before the Alexander Committee were not comparable to the dual-rate system as it now exists. Such "joint contracts" were the exception and not the rule; most of the contracts were made by individual carriers. The economic impact of the latter type of contracts, both on shippers and on nonconference carriers, is

relatively negligible in comparison with the impact of the conference system involved in the instant case.

Furthermore, there was no uniformity in the contracts before the Alexander Committee as to either the differential between the contract and non-contract rates, or the way in which the differential was determined. The contract shipper was not necessarily guaranteed a lower rate for the duration of his contract, but only the same rate. Many of the contracts before the Committee were for fixed periods, whereas the present contracts are of indefinite duration. In sum, the exclusive dealing contracts before the Alexander Committee, unlike deferred rebates and fighting ships, were not primarily used against non-conference line competition but rather to enable particular carriers to secure desirable business.

2. There is no basis for the Board's contention that the principal feature of the deferred rebate system which the Committee found objectionable was that the shipper was kept in continual dependence upon the conference until he obtained his rebate—an evil allegedly not present in the dual-rate system. The basic vice of the deferred rebate system was that the shipper "*is prevented from patronizing any other service* since that act would mean the forfeiture of all accumulated rebates" (Alex. Rep., p. 287, emphasis added). Since most shippers require a regular service (which the independents do not supply), they are required to use conference carriers (which have more frequent sailings).

The actual coercive effect of the dual-rate system upon shippers and independent carriers is substan-

tially the same as the deferred rebate system. Each subjects a shipper who wishes to patronize independent carriers to heavy penalties in the way of substantially higher rates, and each places serious competitive obstacles in the way of the independent carrier. And just as a shipper under the deferred rebate system loses the rebate if it subsequently patronizes an independent carrier, so a signatory of the exclusive patronage agreement has to pay a substantial penalty by way of "liquidated damages" if he chooses to deal with a conference competitor.

We think it would have been anomalous for Congress to have prohibited deferred rebates and at the same time to have sanctioned other devices which have an equally coercive effect upon shippers. A more logical reading of Section 14, and one which effectuates the basic purpose of protecting the independent carriers from conference predatory practices, is that Congress specified the principal unfair practices then employed (deferred rebates and fighting ships), and then went on to condemn all "other discriminating or unfair methods" which might be used to coerce shippers into boycotting independent carriers.

D. The decisions of the Board with respect to the *per se* invalidity of the dual-rate system, as the late Judge Frank declared (96 F. Supp. 883, 890–891), "have lacked uniformity and consistency," and they are entitled to "little weight." In the first case in which the Board considered the problem (in 1922), it held illegal, as unlawfully discriminatory, the use of the system by a single carrier. Eleven years later

(1933), when the Board for the first time upheld the collective use of the system by an entire conference, it distinguished its earlier decision largely on the extraordinary ground that the conference system gives a "choice of carriers" to shippers who sign the exclusive dealing contracts. This distinction, which completely reverses the usual rule that conduct legal when done individually may become illegal when done collectively, was in turn subsequently abandoned by the Board, but has now again been adopted.

In view of the inconsistent position which the Board has taken on this issue, and the fact that the Board did not uphold the legality of a conference dual-rate system until seventeen years after enactment of the statute, the Board's rulings cannot be treated as an authoritative exposition of Congressional intent. On the contrary, the Board's early construction of the Act appears to support the decision below.

E. This Court has not passed on the validity *per se* of the dual-rate system. Of the three cases upon which petitioners rely, two of them (*United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, and *Far East Conference* v. *United States*, 342 U. S. 570) held only that the dual-rate system could not be directly challenged in an antitrust suit, but that the Board's primary jurisdiction must be invoked by filing a complaint under the Shipping Act. The holding in those cases that the Board, and not the courts, should pass upon the legality of the system under the Shipping Act, was not equivalent to holding that the Board could properly approve the system.

For the basis of the doctrine of primary jurisdiction is that agency determination of certain legal and factual questions either may render unnecessary the adjudication of broader legal questions (such as the *per se* validity of the dual-rate system), or, if such questions ultimately are reached, will aid the courts in determining them.

In the third case upon which petitioners rely, *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, the validity of the dual-rate system under Section 14 was not in issue. There this Court upheld the Board's finding that a particular dual-rate system violated Section 16 of the Act, which prohibits "undue or unreasonable preference or advantage." Since the Court upheld the administrative finding that on the particular facts of that case the system could not be approved, it did not reach the broader issues of legality under another section of the Act. Indeed, it is hardly likely that this Court would have determined a question which the Conference itself has characterized as "of Paramount Public Importance" without explicitly so stating and without enunciating the basis for its ruling.

ARGUMENT

THE DUAL-RATE SYSTEM IS ILLEGAL UNDER SECTION 14, THIRD, OF THE SHIPPING ACT, 1916, BECAUSE IT IMPOSES SANCTIONS ON SHIPPERS FOR REFUSAL TO GIVE THEIR EXCLUSIVE PATRONAGE TO CONFERENCE CARRIERS

Section 15 of the Shipping Act, 1916, makes "unlawful," unless approved by the Board, all agreements among common carriers by water fixing or reg-

ulating transportation rates, giving special rates, or controlling, regulating, preventing, or destroying competition. It further provides that the Board "may * * * disapprove, cancel or modify any agreement * * * that it finds to be *unjustly discriminatory* * * * *as between* * * * shippers * * * or to operate to the detriment of the commerce of the United States, or *to be in violation of this Act,* and shall approve all other agreements, modifications or cancellations" (emphasis added). Agreements properly approved by the Board are exempted from the antitrust laws.

Section 14 of the Act outlaws various anticompetitive practices in the shipping industry. It prohibits carriers from giving shippers any "deferred rebate" (Section 14, First), or using a "fighting ship" (defined as a vessel used "for the purpose of excluding, preventing or reducing competition by driving another carrier out of said trade") (Section 14, Second). Section 14, Third, makes it illegal for any carrier to

> *Retaliate against any shipper* by refusing, or threatening to refuse, space accommodations when such are available, or *resort to other discriminating or unfair methods, because such shipper has patronized any other carrier* or has filed a complaint charging unfair treatment, *or for any other reason.* [Emphasis added.]

The Court of Appeals, in setting aside the Board's order approving a conference dual-rate system, held that the charging of a higher rate to a shipper who refuses to agree to boycott competing carriers, as well as the imposition of liquidated damages of 50% upon

a shipper who patronizes a competitor in violation of such an agreement, constitutes discriminatory retaliation within the meaning of Section 14, Third.

We shall show that this holding is correct, and that the dual-rate system also runs afoul of the prohibition in Section 14, Third, against "unfair" methods. We believe that these conclusions follow from the language of the statute; from its legislative history, reflecting a Congressional purpose to prohibit conferences of ocean carriers from using their concerted economic power to injure independent competitors; and from the incongruity of a construction which would permit use of an anticompetitive practice (the dual-rate system) whose economic impact upon shippers and independent carriers is not significantly different from that of another anticompetitive practice (the deferred rebate) explicitly prohibited by Congress.

A. THE CHARGING OF AN ARBITRARILY HIGHER RATE TO A NON-SIGNING SHIPPER BECAUSE OF HIS REFUSAL TO AGREE TO BOYCOTT INDEPENDENT CARRIERS CONSTITUTES RETALIATORY DISCRIMINATION PROHIBITED BY SECTION 14, THIRD

1. *The higher rate is retaliatory*

As the Board has conceded (R. 35), there is "no difference in the cost or value of service rendered to two shippers" one of whom signs an exclusive patronage contract and the other of whom does not. The 9½% differential is thus wholly arbitrary in terms of cost justification; the sole reason the non-signer pays substantially more for the identical transportation service is that he refuses to boycott competitors of the conference. A plainer case of retaliation against

a shipper "because such shipper has patronized any other carrier" would be hard to imagine.

The Board held (R. 58), and here urges (Br. No. 73, p. 22, n. 10), that since the higher rate is charged because the shipper refuses to sign an agreement not to patronize other carriers, it is not charged in retaliation for patronizing such carrier. But this construction places undue emphasis on the mere form of the transaction and departs too far from the reality of the conference dual-rate system. As the Court of Appeals pointed out (R. 242), "[w]hen the latter [the higher non-contract rate] is charged a shipper who has not entered into an exclusive patronage contract the substance of the matter is that a higher rate is charged because he ships by other than Conference carriers. The industry is concerned with the business of shipping, to which the making of contracts is but an incident." See also Judge Washington's concurring opinion (R. 246), pointing out that the dual-rate system "in actual practice * * * is being used to penalize a shipper because he has patronized another carrier, or at least reserved the right to do so."

Furthermore, Section 14, Third, prohibits retaliation not only because the shipper has patronized another carrier but "for any other reason." The statute is thus broad enough to cover retaliation, not only for actually patronizing other carriers, but also for refusal to sign an agreement not to do so.

Indeed, the Board's construction of the Act would open the way to serious evasion. For example, Section 14, Third, also prohibits a carrier from refusing available space because a shipper has patronized other

carriers. The Board's construction, however, would authorize Conference lines to deny space to shippers who refuse to sign exclusive patronage contracts, since such denial would not be for patronizing other carriers but for refusing to agree not to do so. In view of the indisputable Congressional purpose to prohibit conferences from using their concerted economic power to obtain unfair competitive advantages over independent carriers (see *infra*, pp. 41–49), we submit that Section 14, Third, should not be interpreted so as to permit the Conference to do indirectly what it cannot do directly. The Act should be construed so as to effectuate, not to frustrate, its basic purpose. *United States* v. *American Trucking Ass'ns.*, 310 U. S. 534, 542.[10]

2. *The higher rate is unlawfully discriminatory*

Section 14, Third, prohibits a carrier from retaliating against a shipper by refusing available space or

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[10] The Conference contends (Br. No. 74, pp. 42–46) that the court below, in holding that the dual-rate system is retaliatory, ignored the Board's findings to the contrary. But the Board's conclusion rested on its erroneous view (see *supra*) that the system is not retaliatory because the higher non-contract rate is not "charged as a retaliation for 'patronizing any other carrier' * * * [but] because the shipper does not sign the contract, regardless of whether or not he patronizes any other carrier."

The Board's own findings refute the Conference's argument (Br. No. 74, p. 46) that the higher non-contract rate is not "coercive or penal." The Board found that the higher rate does not reflect any "difference in the cost or value of service rendered" (R. 35) to the non-signing shipper. And the admitted purpose of the system is to force shippers into giving all their business to the Conference, thereby aiding the Conference in obtaining a monopoly of the trade. See *infra*, p. 46.

resorting to "other discriminating or unfair methods." The Board recognized (R. 59, 67), as this Court repeatedly has pointed out,[11] that the charging of two different rates for the same transportation service is "prima facie discrimination". However, it construed the unqualified prohibition against discrimination in Section 14, Third, as condemning only "unjust" discrimination, and concluded that the admittedly discriminatory dual-rate system here involved was not "unjustly" so.

The legislative history of the Act indicates, however, that the unqualified prohibition against discrimination was deliberate, not inadvertent, and that Congress in Section 14, Third, intended to prohibit *any* discrimination, not merely "unjust" discrimination. The report of the Alexander Committee (hereinafter cited as "Alex. Rep."), which is the principal source of the legislative history of the Act,[12] reflects the strong

[11] See *Western Union Tel. Co.* v. *Call Publishing Co.*, 181 U. S. 92, 100; *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, 583; *Alabama Great Southern R. Co.* v. *United States*, 340 U. S. 216, 227; cf. *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 303.

[12] The Alexander Report was prepared by the House Committee on the Merchant Marine and Fisheries pursuant to resolutions in the 62d Congress (H. Res. 425, 587) and the 63d Congress (H. Res. 205), and was submitted during the 63d Congress in 1914 (H. Doc. 805, 63d Cong., 2d Sess.). It was on extensive hearings and documentary evidence submitted to the Committee. A bill largely carrying out the recommendations of the Report was introduced (H. R. 17328), but not passed. In the 64th Congress, the bill was reintroduced in substantially

demand of shippers that such an aboslute ban be imposed. Thus, in summarizing the recommendations which it had received, the Committee stated (p. 313, emphasis added): "Briefly stated, it was the consensus of opinion that *discrimination between shippers in the matter of rates* and cargo space *should be absolutely prohibited* * * *." And the Committee recommended "that, with due regard to the proper loading of the vessel and the tonnage available, discrimination between shippers * * * in the matter of rates * * * be prohibited" (p. 421).

That the drafters of the Act did not intend "discriminating" in Section 14, Third, to be construed as "unjustly" (or "unreasonably") discriminating, is indicated by their use of the two phrases "discriminating or unfair" and "unjustly discriminatory or unfair" in two bills introduced in Congress by Chairman Alexander (H. R. 17328, 63d Cong., 2d Sess.; H. R. 15455, 64th Cong., 1st Sess.). Section 2, Third, of the first bill (which corresponds with Section 14, Third, of the Act) contained the phrase "discriminating or unfair" as Section 14, Third, of the Act does today. Section 3 of that bill (which generally corresponds with Section 15 of the Act) similarly specified that the Interstate Commerce Commission was empowered to disapprove agreements which it found

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the same form (H. R. 15455, 64th Cong., 1st Sess.). The report of the Committee recommending the bill quoted verbatim the recommendations of the Alexander Report, and stated that the bill had been framed in large part upon the basis of its recommendations. H. Rep. 659, 64th Cong., 1st Sess., p. 27. The Senate Committee also adopted the recommendations of the Alexander Report. S. Rep. 689, 64th Cong., 1st Sess.

to be "discriminating or unfair" as between shippers. Later, however, when Chairman Alexander introduced H. R. 15455 (the bill which became the Shipping Act), the phrase "discriminating or unfair" in Section 3 of H. R. 17328 had been changed in H. R. 15455 to "unjustly discriminatory or unfair." But the phrase "discriminating or unfair" in Section 2, Third, of H. R. 17328, was unchanged in H. R. 15455. In short, Congress added the qualifying adjective "unjustly" in one section of the Act but did not do so in the section now under consideration. From this, it can only be concluded that, had the Alexander Committee wished to limit Section 14, Third, to "unjustly" discriminatory practices, it would have done so explicitly at the same time.

The fact that qualifying adjectives are found in provisions relating to general discrimination between carriers, shippers, ports, etc. (see Sections 15–17, *infra*, pp. 63–65) is nowise inconsistent. Congress may well have recognized that some differences which would be called discrimination would inevitably occur in the rate structures and services rendered, and deliberately have left some leeway for such differences, if found by the Board not to be unjust or unreasonable. But when Congress dealt with retaliation in Section 14, Third, it was less indulgent. Even a little retaliation, achieved by a discriminating or unfair method, is a dangerous and undesirable practice. Congress presumably felt the same way about retaliation as it did about deferred rebates and fighting ships, which it also forbade without qualification. A similar deliberate differentiation between any discrimination

and "undue or unreasonable" discrimination is found in the Interstate Commerce Act. See opinion of Judge Learned Hand in *Baltimore & Ohio R. Co.* v. *United States*, 22 F. Supp. 533, 538 (N. D. N. Y.).

But even assuming *arguendo*, as the Board contends (Br. No. 73, pp. 59–62), that Section 14, Third, prohibits only "unjust" discriminations, such a construction would not legalize the dual-rate system. For if there were some difference, albeit a slight one, between the services offered the contract and non-contract shipper, there might well be a question whether the admittedly discriminatory rate differential was "unjust." Concededly, a rate differential may be justified under a statute prohibiting unjust discrimination or undue preference if it has some "reasonable relation to the amount of difference" in services provided. *Western Union Tel. Co.* v. *Call Publishing Co.*, 181 U. S. 92, 100. But here there is not even a pretense of a difference in service. Accordingly, by any standard known to transportation law, the differential must be regarded as wholly arbitrary and therefore "unjustly" discriminatory.

Indeed, it is difficult to suggest a clearer case of "unjust" discrimination than that of two shippers paying different rates for the same cargo, moving side by side in the same vessel between the same ports, solely because one has agreed and the other has refused to boycott the carrier's competitors. And such discrimination does not become "just" merely because it is an effective device for carrying out what the Board deems to be the laudable purpose of promoting "stability" in the trade by weakening Isbrandtsen's

competitive position.[13] Although the Board generally has broad discretion to determine whether a particular discrimination is "unjust" (see *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 304), it cannot ignore settled principles of transportation law in making that determination.[14]

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[13] Significantly, it was the Conference itself, and not Isbrandtsen, which created "instability" by instituting the rate war. As the Board found (R. 29), rates in the trade were stable prior to the rate war.

[14] The above showing that the dual-rate system is unjustly discriminatory also compels, we believe, its invalidation under Section 17 of the Shipping Act. That section prohibits any water carrier from collecting any rate which, *inter alia*, is unjustly discriminatory between shippers. This prohibition parallels the prohibition on "unjust discrimination" in Section 2 of the Interstate Commerce Act (24 Stat. 379, as amended, 49 U. S. C. 2), which is defined as the charging of different rates for "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." This Court has pointed out that "the settled construction in respect of the [Interstate Commerce] act must be applied to the [Shipping Act, 1916] * * *." *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 481. There can be no question that, under Section 2 of the Interstate Commerce Act, no railroad in the country—let alone a group of railroads acting in concert—would be permitted to charge one shipper 9½% more than another for the same service solely because the latter refused to give the carrier all his business. See cases cited *supra*, p. 25, note 11.

Under this analysis, the Board is precluded from approving the dual-rate system both because it violates Section 17 and because of the requirement in Section 15 for disapproval of any agreement which is found to be "unjustly discriminatory * * * as between * * * shippers * * *."

The dual-rate system similarly runs afoul of Section 16 of the Shipping Act. Both that section and Section 3 (1) of the Interstate Commerce Act prohibit common carriers from giv-

3. *Section 14, Third, applies to rates as well as services*

Petitioners contend (Br., No. 73, pp. 23–24, 55–59; Br. No. 74, pp. 33–40, 78–80, 85–86, 90), however, that Section 14, Third, prohibits retaliatory discrimination only with respect to services, and not with respect to rates. They argue (1) that the legislative history shows that the Alexander Committee used the word "retaliation" primarily in connection with denial of space or similar discriminations in service; and (2) that, since the first clause of Section 14, Third, prohibits refusal of space, the reference to "other" discriminating methods in the subsequent clause of that section must, under the rule of *ejusdem generis*, be limited to other service discriminations.

But the fact that the Alexander Committee used the word "retaliation" in speaking of services affords no basis for inferring that Congress intended to limit the broad language of Section 14, Third, only to services. It shows only that refusal of space was one of the principal retaliatory measures which conferences employed against shippers who patronized the independents. The Congressional purpose to prohibit conferences from using their concerted economic power to drive independent ship owners out of the

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ing any "undue or unreasonable preference or advantage to any particular person * * *" or subjecting any person "to any undue or unreasonable prejudice or disadvantage *in any respect whatsoever*" (emphasis added). Plainly, it would constitute undue or unreasonable preference or prejudice for a railroad to give a shipper a substantially lower rate solely because of his exclusive patronage; it is similarly preferential and prejudicial for an ocean carrier to do so.

trade (see *infra*, pp. 41–49) is completely inconsistent with the view that Congress sanctioned retaliation with respect to rate matters.

Nor does the fact that the phrase "other discriminating or unfair methods" follows the single clause prohibiting retaliation in space accommodations afford any basis for limiting the other methods condemned to those relating to service. Even assuming that the rule of *ejusem generis* is applicable here, it would appear that the phrase "other discriminating or unfair methods" was meant to bar similar types of retaliation (such as retaliation by rate discrimination) and not only retaliation with respect to services. Particularly is this so in view of this Court's admonition that "The rule of *ejusdem generis* * * * may not be used to defeat the obvious purpose of legislation." *Gooch* v. *United States*, 297 U. S. 124, 128; *United States* v. *Alpers*, 338 U. S. 680, 682. Here the "obvious purpose" of this legislation was to prevent the Conference from using its concerted economic power to drive independent carriers out of the trade.[15] See *infra*, pp. 41–49.

Equally without merit is petitioners' contention (Br. No. 73, pp. 22–23, 42, 55; Br. 74, p. 40) that

[15] Similarly without any basis is the Conference argument (Br. No. 74, pp. 37–38) that the ban on "other discriminating or unfair methods" in Section 14, Third, relates only to the practices covered by subsections (b) and (c) in Section 14, Fourth—namely, the loading and landing of freight in proper condition, and the adjustment and settlement of claims. There is nothing in either the language of the Act or its legislative history to show that Congress intended thus to limit the broad language in Section 14, Third.

under our construction Section 14, Third, would also outlaw deferred rebates, and that Section 14, First, would therefore be redundant. Congress quite plainly was not referring to deferred rebates and fighting ships in Section 14, Third, when it spoke of resorting to "*other* discriminating or unfair methods;" for earlier provisions of the statute had already outlawed those practices. In other words, Congress specifically prohibited deferred rebates and fighting ships, the most widespread and generally criticized methods employed by the conferences at that time, and then went on to condemn all "*other* discriminating or unfair methods" (emphasis added) which might be used to coerce shippers into boycotting independent carriers.

In sum, Section 14, Third, prohibits any discrimination by carriers against shippers based on their refusal to deal exclusively with such carriers. This result follows whether (a) the "retaliate" and "resort to" clauses are read as co-equal prohibitions or (b) the "space accommodations" and "resort to" clauses are read as alternative ways to "retaliate". Under the latter construction, adopted by the court below (R. 242–243),[16] the dual-rate system plainly constitutes retaliatory discrimination against a shipper "because such shipper has patronized any other carrier * * * or for any other reason." Under the other interpretation, it is equally clear that a carrier

[16] This construction, it should be noted, parallels Recommendation No. 6 of the Alexander Committee (see *infra*, pp. 35, 36). Apparently neither petitioner challenges this construction of the provision.

which charges a shipper a substantially higher rate because the latter has refused to boycott competing independent carriers thereby "resort[s]" to other discriminating or unfair methods, because such shipper has patronized any other carrier * * * or for any other reason." Irrespective of which construction is adopted, the gist of the violation is the imposition of sanctions against shippers for their refusal to give exclusive patronage to conference carriers.

B. THE DUAL-RATE SYSTEM IS ALSO AN "UNFAIR METHOD" UNDER SECTION 14, THIRD

The conference dual-rate system is also unlawful under Section 14, Third, in that it constitutes an "unfair method" used against independent shippers. Concededly, the term "unfair" is a general one with many meanings in different contexts. But here, for the reasons set forth above, Congress quite plainly had in mind the abuse of the combined economic power of the conferences being used to squeeze independents and shippers. If it is unfair (and Congress undoubtedly thought that it is) to refuse available space to a shipper because he has patronized another carrier, it is equally unfair to offer the space but only at a penalty rate. Similarly, if deferred rebates and fighting ships are unfair, it can hardly be regarded as fair to impose substantial penalties in the form of increased rates in order to coerce shippers to abandon their economic freedom to patronize carriers of their choice.

In *Prince Line* v. *American Paper Exports*, 55 F. 2d 1053, 1055 (C. A. 2), a proceeding concerning Section 16 of the Act, the court, through Judge Learned

Hand, defined an "unfair device" as one which "destroyed that equality of treatment between shippers, which it was the primary purpose of the section, and for that matter of the whole statute, to maintain."

And in *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, 1 U. S. S. B. 41, 45–46, the Shipping Board described the dual-rate contracts involved there as being of the same nature as "other kinds of unjust discrimination resulting from *unfair conditions imposed by carriers upon shippers*" (emphasis added). The Board there also rejected the contention that shippers were not denied "substantial equality of treatment" because they were "extended full opportunity to avail themselves of the lower rates by agreeing to the same conditions which contract shippers had accepted." It ruled (*ibid.*):

> Under the statute, the complainants, as members of the shipping public, were entitled to have their shipments carried at the same rates as other patrons who received identical service. This right attached to each individual transportation transaction as such, and was not to be predicated upon any condition imposed by the respondent restricting the complainants' freedom of choice as to what carrier or carriers they should elect to patronize in connection with subsequent shipments.

To the same effect is *Contract Routing Restrictions*, 2 U. S. M. C. 220, 226, in which the Board condemned a dual-rate system, stating that "Equality of treatment is not accorded the shipper merely by giving him the opportunity to enter into discriminatory contracts in the same manner as offered to all shippers."

C. THE LEGISLATIVE HISTORY OF THE ACT DOES NOT REFLECT ANY IMPLIED CONGRESSIONAL APPROVAL OF THE DUAL-RATE SYSTEM, BUT SHOWS RATHER A PURPOSE TO OUTLAW ALL DISCRIMINATORY PRACTICES USED BY CONFERENCES TO PENALIZE THE PATRONAGE OF INDEPENDENT CARRIERS

The basic question before the Alexander Committee was whether to recommend abolition of the conference system. Extensive arguments were presented in favor of and against the system (Alex. Rep., pp. 295–307), and the Committee concluded (*id.*, p. 415) that "only two courses of action" were possible:

> Either the agreements and understandings, now so universally used, may be prohibited with a view to attempting the restoration of unrestricted competition, or the same may be recognized along lines which would eliminate existing disadvantages and abuses. [*Id.*, pp. 415–416]

The Committee recommended the second course—continuation of the conference system but "under some form of effective government supervision" (*id.*, p. 417) "which would eliminate existing disadvantages and abuses" (*id.*, pp. 415–416). The Committee made seven detailed recommendations with respect to such regulation. Among the proposals was that "rebating of freight rates to shippers be made illegal," and that, "with due regard to the proper loading of the vessel and the tonnage available, discrimination between shippers, or ports, in the matter of rates and space accommodations be prohibited" (*id.*, p. 421).

Recommendation No. 6 was (*ibid.*)

> That the use of "fighting ships" and deferred rebates be prohibited in both the export and import trade of the United States. Moreover, all carriers should be prohibited from retali-

> ating against any shipper by refusing space accommodations when such are available, or by resorting to other unfair methods of discrimination, because such shipper has patronized an independent line, or has filed a complaint charging unfair treatment, or for any other reason.

This recommendation parallels the provisions, and was the source, of Section 14, First through Third.

In order to determine what the Committee had in mind when it recommended a prohibition against "resorting to other unfair methods of discrimination," it is necessary to examine the anticompetitive practices which the Committee found had been used by conferences for "meeting the competition of non-conference lines" (*id.*, p. 415; see also, p. 417). In its summary of "methods of control exercised in connection with steamship conferences and agreements in American foreign trade" (*id.*, p. 281), the Committee stated that conferences had "adopted" "[t]hree methods" "to defend their mutual interests in the event of competition from other lines" (*id.*, p. 287). These methods were listed as:

> (1) The deferred rebate, which "has proved by far the most effective device for the control of a trade * * *." (*ibid.*).
>
> (2) "*The use of fighting ships, or collective competition against a single competing line*" (*id.*, p. 289, italics in original).
>
> (3) "*Contracts with shippers which may be classified as:* (a) *Joint contracts made by the conference as a whole* * * *"; (b) "*Contracts made by the individual members of the conference* * * *"; and (c) "*Contracts with large*

shippers either for all their freight or for certain important articles forming the main basis in a given trade, at lower rates than those charged on similar goods, if shipped in small quantities" (*id.*, pp. 290–291; italics in original).

Petitioners argue (Br. No. 73, pp. 35–42; No. 74, pp. 79–84, 86–91) that the "joint contracts made by the conference as a whole" referred to in 3 (a), *supra*, were substantially the same as the dual-rate contracts here involved; and that the failure of Congress specifically to outlaw such joint contracts, while prohibiting deferred rebates and fighting ships, manifests an intent to sanction the former. But such "joint contracts" were not comparable to the dual-rate system; and the fact that the Alexander Committee recommended outright prohibition of deferred rebates and fighting ships, and did not propose a specific ban on "joint contracts made by the conference as a whole," does not establish that the Committee thereby intended to give the dual-rate system its blessing.

1. *The contracts before the Alexander Committee are not comparable to the present dual-rate system*

Contrary to petitioners' contention (Br. No. 73, pp. 42–50; No. 74, pp. 81–83), the contract "system" which was before the Alexander Committee is not comparable to the dual-rate system as it now exists. At the outset, the evidence before the Committee showed that the "joint contracts made by the conference as a whole" were the exception and not the rule; the usual contract was between a shipper and an individual line. Thus, petitioners place great reliance on certain con-

tracts submitted to the Committee by Mr. Gerhard general agent of the Prince Line. But only 3 of the 43 contracts submitted were joint contracts made for the conference; the remaining 40 were made by individual lines. Proceedings of the Committee on the Merchant Marine and Fisheries in the Investigation of Shipping Combinations under House Resolution 587 (62d Congress) (hereinafter cited as "Hearings"), pp. 246-263. Mr. Gerhard testified (Hearings p. 263) that the contracts were jointly assumed by other members of the conference only "[w]here it comes to large bulk and one line does not care to assume the responsibility of the whole contract * * *."

Surely the submission of three such contracts (out of 43) provides no basis for any inference of their approval by the Alexander Committee—let alone the present dual-rate system; even less justified would be any inference of approval by the Congress as a whole. And, with respect to the 40 contracts made with some individual carriers, the economic impact of such contracts is quite different from the economic impact of a dual-rate system used jointly by members of an entire conference. In the former situation, there is relatively little coercion on the shipper to give his exclusive patronage to a single carrier; if he does not do so, the shipper is free to turn to other carriers—conference or nonconference—which are willing to carry the goods at the regular rate without requiring a commitment of exclusive patronage. On the other hand, where the entire conference joins together in requiring such a commitment from the

shipper, independent carriers (already or potentially in the trade) are effectively frozen out; for, as we show (*infra*, p. 43), shippers who require a regular service (as most do) necessarily must use conference carriers and will in most instances find it financially essential to agree to boycott independent carriers.

Furthermore, there was no uniformity in the contracts before the Alexander Committee as to either the differential between the contract and non-contract rate or the way in which the differential was determined. In some instances, the contract rate was fixed as a result of negotiations between a shipper and an individual line, and was given because the shipper was a large customer rather than because he agreed to ship exclusively via the particular carrier (Hearings, pp. 634–636, 706). Many (if not most) of the contracts did not provide for fixed percentages below the tariff rate, but merely for stated rates (*id.*, p. 213–214, 615–617, 653–654). While the rate thus fixed often would be below the regular tariff, particularly if a large shipper were involved, nevertheless at some time during the period of the contract it might be considerably above or below the tariff.[17] Thus, the signatory to an exclusive patronage contract was not necessarily guaranteed a lower rate than a non-signatory, but only that his rate would be the same for the term of the contract—an important consideration to shippers

[17] The general freight agent of one steamship line testified that "A man who makes a contract with us for a year might, in some cases, be paying more freight if competitive conditions had forced our rates down at different times * * * He has done it in several cases." Hearings, p. 654.

in meeting competitors' quotations for future delivery (Hearings, 213, 460–461, 615–617).

Unlike deferred rebates and fighting ships, therefore, exclusive dealing contracts primarily were not used against non-conference line competition (although they sometimes served that purpose), but rather to enable particular carriers to secure desirable business.

A further significant distinction is that many of the contracts before the Committee were for fixed periods, usually six months or a year (Hearings, pp. 288, 632–634), while the present contracts are of indefinite duration.

In short, the most that the evidence before the Alexander Committee shows is that there were a few contracts which in some respects were similar to the dual-rate agreements here involved. But the dual-rate *system*, as it now exists, involving the concerted use by a conference of its economic power to coerce shippers into boycotting the independents, was not then in use. Indeed, since the deferred rebate system had "proved by far the most effective device for the control of a trade * * *" (Alex. Rep. 287), conferences would have little need to use the less effective dual-rate system until the deferred rebate had been prohibited by the Shipping Act, 1916.[18] It is hardly surprising,

[18] "* * * it is not definitely known when they [dual-rate agreements] became widely prevalent in American trades, but it is generally thought that they came into fairly general use during the 1920's, after the war-created shortage of shipping turned into a plethora of tonnage." Marx, *International Shipping Cartels* (1953), p. 210.

therefore, that Congress did not single out the dual-rate system for specific condemnation.[19]

Furthermore, unlike the deferred rebate and the fighting ship, which Congress could, and did, define with precision, the exclusive dealing arrangements were of such a wide variety and form that it would have been extremely difficult, if not impossible, for Congress to have specified the particular ones to be outlawed. Also, such attempted specification might have been dangerous, since it could have opened the door to evasion through variations in the form of the transaction. The more logical way to deal with the problem and the one which, we believe, Congress adopted, was to employ a general provision which was broad enough to cover all "other discriminating or unfair methods."

2. *The present dual-rate system is indistinguishable in substance from the deferred rebate system condemned by Congress*

Nor is there any basis for the Board's contention (Br. No. 73, pp. 39–40) that the principal feature of the deferred rebate system which the Committee condemned was that the shipper was kept in continual dependence upon the conference—an evil allegedly not present in the dual-rate system. True, the Committee did state, in a summary of *contentions* as to the disad-

[19] Another reason may have been that the methods used by conferences "to meet the competition of nonconference lines" about which shippers filed complaints with the Alexander Committee were "fighting ships, deferred rebates, and threats to refuse shipping accommodations * * *." Alex. Rep., p. 417.

vantages of shipping conferences and agreements a
then conducted, that (p. 307):

> By deferring the payment of the rebate unti
> three or six months following the period t
> which the rebate applies ship owners effectivel
> tie the merchants to a group of lines for succes
> sive periods. In this connection *it is argue*
> that the *ordinary contract system* does no
> place the shipper in the position of continua
> dependence that results from the deferred re
> bate system. [Emphasis added.]

But the quoted passage is not a statement of approva
but merely a statement of an argument made befor
the Committee which, contrary to the Conference'
contention (Br. No. 74, pp. 62–64), the Committe
neither expressly approved nor disapproved.[20]

The basic vice of the deferred rebate, moreover
was not that it kept the shipper in a position of con
tinued dependence upon the conference, but that th
shipper "*is prevented from patronizing any othe
service* since that act would mean the forfeiture of al
accumulated rebates" (Alex. Rep. 287, emphasi
added). In other words, the deferred rebate, by re

[20] The footnote dictum in *Swayne & Hoyt, Ltd.* v. *Unite
States*, 300 U. S. 297, 307, fn. 3, relied upon by petitioners (Br
No. 73, pp. 40, 64–66; No. 74, pp. 60–66; see R. 50–51), tha
"The Committee recognized that the exclusive contract syste
does not necessarily tie up the shipper as completely as 'de
ferred rebates,' since it does not place him in 'continual depend
ence' on the carrier * * * [and] the Committee did not con
demn the contract system completely," appears to be based o
a misreading of the Committee's position, as Judge Washingto
pointed out below (R. 246).

quiring a shipper to pay more for the same service if he patronized an independent carrier, made it economically difficult, if not impossible, for him to do so, and thereby effectively kept the independents out of the trade. The concerted use of this device by a conference was particularly effective as an anticompetitive device because (Alex. Rep. 288),

> * * * as has been repeatedly pointed out in this volume, shippers require, above all else, a regular service, and in this connection the testimony shows that by patronizing an outside line the shipper would not only forfeit his rebates but could be penalized by being denied accommodadations for future shipments even at the full rates of freight. Such retaliation would leave the shipper unprotected since an independent line is not large enough to supply him with tonnage at all times. In other words, the conference lines, by rotating the sailings of their steamers, can give a regular and frequent service, whereas the independent line with its fewer steamers can only offer sailings at less frequent intervals.

The actual coercive effect of the conference dual-rate system upon shippers and independent carriers is substantially the same as the deferred rebate system. Each subjects a shipper who wishes to patronize independent carriers to heavy penalties in the way of substantially higher rates, and each imposes serious competitive obstacles in the way of the independent carrier. Just as a shipper under the deferred rebate system loses a rebate if it subsequently patronizes an independent, so a signatory to the exclusive patronage

agreements under the dual-rate system is forced to pay a substantial penalty by way of liquidated damages if he chooses to deal with a conference competitor.[21]

A hypothetical case will, perhaps, serve best to illustrate the close similarity between the deferred rebate system and the dual-rate system. Under the deferred rebate system, which was in common use when the Alexander report was written, Shippers A and B would pay identical sums, let us say $100, for identical shipments over a conference line. Shippers were invited, however, to sign exclusive patronage contracts. These contracts provided, in substance, that the shipper would receive a rebate, let us say of 10%, some time after the expiration of the contract, if he had patronized conference lines exclusively during the contract period. Thus, if Shipper A signed and observed such a contract, his actual rate would ultimately prove to be $90, *i. e.*, $100 less the $10 deferred rebate. To Shipper B, a non-signer, the rate would remain $100.

Under the dual-rate system, the same end result is reached by a slightly different road. A shipper who signs the exclusive contract thereby receives the reduced rate in advance and is made subject to penalty provisions (see R. 36) if he thereafter fails to observe the exclusivity requirement. And a shipper who fails to sign is compelled to pay a higher rate, the amount

[21] The Conference's argument (Br. No. 74, pp. 46–49) that the liquidated damages clause is valid is beside the point. The significant thing about this provision is that it coerces a contract shipper not to patronize independent carriers.

of the differential depending upon the particular percentage fixed.

In either event, it is obvious that the shipper who refuses to sign the exclusive contract is penalized. It is immaterial whether this is accomplished by giving the contract shipper a premium in advance—a prepaid rebate, as it were—or by paying him a deferred rebate.

3. Congress sought to protect shippers from coercive conference practices with respect to the granting of exclusive patronage.

We think it would have been anomalous for Congress to have prohibited deferred rebates and at the same time to have sanctioned other devices which have an equally coercive effect upon shippers. A more logical reading of Section 14, and one which effectuates the basic Congressional purpose of protecting the independent carriers from the predatory practices of the conferences, is that Congress specified the principal unfair practices then employed and then went on to condemn "all other discriminating or unfair methods" which might be used to coerce shippers into granting their exclusive patronage to conference carriers.

The fact that Congress selected a "regulated conference system in preference to unregulated cutthroat competition" (R. 59) and empowered conferences, subject to Board approval, to destroy competition among their members by fixing rates, does not mean that conferences also were authorized to use their collective economic power against independent carriers. It is one thing for a group of competitors to

eliminate competition among themselves; it is quite another for them to attempt concertedly to eliminate another competitor.

As the Board has "candidly" recognized,[22]

> The contract system should be frankly recognized as a device tending towards the monopolization of ocean commerce in particular trades by the members, collectively, of conferences which serve those trades. We use the word "monopolization" with no ideological overtones, but merely in its dictionary sense, which is the obtaining or assumption of "exclusive possession or control." Whether the contract system in a particular case actually has the effect of producing a complete monopoly (*i. e.*, control of a trade) depends upon how well it works; admittedly, it is monopolistic in purpose. The extent to which it is monopolistic in effect depends upon how successfully that purpose is achieved * * * if a contract system is wholly effective, it will result in a complete monopoly in the sense that all cargo moving in a trade where the system is used, will move in ships of conference carriers. Necessarily, in these circumstances, there would be no service by independent operators.[23]

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[22] The Board's statements were made in its brief filed in *Isbrandtsen Co. v. United States*, 96 F. Supp. 883, and quoted in the court's opinion at page 888, footnote 13.

[23] See also *In the Matter of the Statement of Transpacific Freight Conference of Japan, No. 743* (December 19, 1955), where the Board, in disapproving a conference agreement to institute a dual-rate system, stated (mimeographed opinion, p. 26, emphasis added) that the "possibility" that a conference would "have a monopoly of the trade" is not "in itself objectionable," but that "a monopoly which would be created as a result of the in-

It is hardly likely that Congress, after carefully prohibiting the principal devices (fighting ships and deferred rebates) which the conferences had used in attempting to monopolize the trade, would have sanctioned a similar device which, if "wholly effective * * * will [also] result in a complete monopoly" of the trade.[24] And it is no answer that the Board has estimated that in this particular trade the dual-rate system will "probably" permit Isbrandtsen to hold 10% of the business. The legality of such a device

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stitution of a dual rate system is not permissible unless the potential disadvantages of that monopoly and the prima facie discrimination against shippers inherent in the use of dual rates are outweighed by the need for such a system and the benefits to shippers and the trade to be derived from the system. * * * *To hold that a dual rate system may never be instituted where its use would result in monopoly would defeat the congressional purpose in passing the act and in exempting agreements among carriers from the operation of the antitrust laws.*" Chairman Morse, dissenting, expressed a similar view (*id.*, p. 33): "we must at the outset recognize the immediate purpose of the [dual rate] system, simply stated, to be the elimination of nonconference competition, as such, as a significant force in that trade * * *."

[24] The Board argues (Br. No. 73, p. 54) that, since there was submitted to the Alexander Committee a statement by conference line representatives (Hearings, pp. 1357–1374; see also pp. 369–381) to the effect that if deferred rebates were outlawed they would be succeeded by a contract rate system, the Committee "must have anticipated that a contract rate system would replace the deferred rebate system"; and that the Committee's failure to condemn the contract rate system thereby impliedly constituted approval. But this statement was presented by a conference line representative in support of the argument that the deferred rebate should not be prohibited. The statement provides no basis for inferring that Congress impliedly sanctioned what the steamship representatives threatened might come to pass.

does not depend on how completely it achieves monopoly, for it is equally illegal whether it produces a 90%, a 95%, a 99%, or a 100% monopoly.

The conclusion that Congress did not intend to sanction practices with such monopolistic tendencies is strengthened by the fact that, as the Board recognized (R. 57), Congress did not give it the rate-fixing power which customarily is provided in a system of public utility regulation which contemplates or tends toward monopoly. Without effective competition by independent carriers, conferences would have little incentive to keep rates at a reasonable level. Cf. *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 427 (C. A. 2), pointing out that "possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone." [25]

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[25] The Board argues (Br. No. 73, p. 30) that outlawing the conference dual-rate system would injure American-flag carriers. The argument is that, once the conference members are "seriously hurt by the independent's rate-cutting, the conference is strongly impelled to abandon its [uniform] rate structure and * * * to permit each of the members to fix its own rates independently. All lines, including the independent, are then placed in a position of unrestrained competition, and low operating costs become the main index of ability to survive. In a situation of this sort, American-flag lines are by far the most vulnerable, for ship operating and construction costs under United States registry are, and historically have been, materially higher than under any other."

This argument, however, ignores the fact that, under Title VI

That Congress intended Section 14 to outlaw *all* discriminatory practices which the conferences might use as economic barriers against the independents, and not just the practices specifically enumerated, is further shown by the following statement by Representative James F. Byrnes, a member of the Alexander Committee, made on the floor of Congress with respect to Section 14 (53 Cong. Rec. 8087): "The regulatory features of the bill are agreed to by all fair-minded men. They seek simply to enable an independent shipowner to carry on his business without having the shipping trust drive him out by discriminatory and unfair practices." [26]

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sidies are paid to American-flag carriers on the basis of "the amount by which the cost of operating the vessel under United States registry exceeds the estimated cost of operating the same vessel under competitive foreign registry." Sen. Rep. 2494, 81st Cong., 2d Sess. (1950), p. 43. The subsidy is designed to eliminate or minimize the adverse competitive position of American-flag carriers due to the lower operating costs of their foreign competitors.

[26] There is no merit to the Conference's argument (Br. No. 74, pp. 91–93) that the subsequent history of Congressional study and regulation of American foreign trade indicates that Congress implicitly sanctioned the Board's approval of the conference dual-rate system. Although it relies on a statement in a 1950 Senate Committee Report which approved the conference system, it fails to point out that the Committee explicitly refused to take a position with respect to the validity of the dual-rate system. Thus, in the paragraph immediately preceding the language which the Conference quotes, the Committee stated (Sen. Rep. 2494, 81st Cong., 2d Sess., pp. 84–85, emphasis added):

"The Maritime Commission and its predecessors charged with enforcing the law have recognized the contract rate system as legal. However, the system has recently been attacked by one of the shipping lines as illegal and oppressive. The Depart-

The Board's argument (Br. No. 73, pp. 25–33; R. 59–60) that the penalty rate system should be approved because it is essential to the successful functioning of the conference system cannot prevail. First, there is no indication that Congress considered the penalty rate system or any other measure for coercing exclusive patronage of conferences a permissible method of competition. The Act and the legislative history reflect the opposite view. But even if the penalty rate system were the *sine qua non* of conference survival, the Board would be powerless to abrogate express prohibitions of the Shipping Act to make use of the system possible. Second, the Board's own findings refute its conclusion that conference members need to rest upon the crutch of discriminatory rates in order to survive. Prior to the Conference's institution of the rate war in March 1953, the Conference, at a time when Isbrandtsen was vigorously competing in the trade, had been able to obtain and hold between two-thirds and three-quarters of the traffic in this trade (see *supra*, p. 5). Moreover, the continued existence of many conferences which do not use the dual-rate system, or which do not apply it to commodities generally, attest the fact that the penalty rate system is not indispensable.

D. THE DECISIONS OF THE BOARD ARE OF LITTLE WEIGHT HERE

Petitioners argue (Br. No. 73, pp. 69–73; No. 74, pp. 67–74) that the Board consistently has held that

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ments of Agriculture and Justice have joined the attack. *Pending a decision by the courts as to the legality of the practice, the subcommittee does not believe it advisable to comment definitely upon this phase of the matter.*"

the dual-rate system is not illegal *per se,* and that this interpretation of the statute by the agency charged with enforcing it "is entitled to weight" (*ibid.*). But, as the late Judge Frank declared, the Board decisions "have lacked uniformity and consistency; and in such circumstances, administrative interpretations have little weight" (citing numerous cases).[27]

That the Board has far departed from its earlier interpretation of the Act is shown by its 1922 decision in *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.,* 1 U. S. S. B. 41, holding unlawful as "unjustly discriminatory" (under Sections 16 and 17 of the Act) a dual-rate formula used by a single carrier. The Board stated (p. 45):

> * * * It is evident that *the purpose of Congress in enacting these provisions of the statute was to impose upon common carriers within the purview thereof the duty of charging uniform rates to all shippers receiving a similar transportation service.* The duty of the respondent under these sections was to serve the public impartially, and we think the language used in Western Union Tel. Co. v. Call Pub. Co., 181 U. S. 92, in dealing with a similar statute, is entirely applicable to the case in hand. The court there said: "All individuals have equal rights both in respect to service and charges. Of course, such equality of right does not prevent differences in the modes and kinds of service and different charges based thereon. * * * *But that principle of equality*

[27] *Isbrandtsen Co.* v. *United States,* 96 F. Supp. 883, 890–891 (S. D. N. Y.), affirmed by equally divided Court *sub nom. Mowinckels Rederi* v. *Isbrandtsen Co.,* 342 U. S. 950.

> *does forbid any difference in charge which is not based upon difference in service*, and, even when based upon difference of service must have some reasonable relation to the amount of difference, and can not be so great as to produce an unjust discrimination." From the facts of record in the case before us it is manifest that the transportation service furnished the complainants and contract shippers was in all respects identical. [Emphasis added.]

As we have already pointed out (*supra*, pp. 43–45), the coercive effect of a dual-rate formula used by a single carrier is relatively negligible in comparison with the impact of a system used jointly by the members of an entire conference. Under the *Eden* decision, therefore, it would seem to follow *a fortiori* that such a system would constitute unlawful discrimination.[28]

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[28] Petitioners, however, rely on the following excerpt from the Board's opinion in *Eden* (p. 46) as upholding the legality of a dual-rate system under Section 14, Third:

"No evidence was adduced relating to any action of the respondent tending to show direct or indirect retaliation against the complainants for patronizing other carriers. Likewise, from the facts of record it is clear that the contracts for exclusive patronage complained of were not to any extent based upon volume of freight offered. That part of the complaint alleging violations by the carrier of paragraphs 3 and 4 of section 14 of the act is, therefore, without support."

This contention of petitioners is without merit on several grounds.

First, on its face, the excerpt merely relates to the failure of the complaint to adduce evidence of retaliation; the excerpt does not indicate what the disposition would be if such evidence were adduced. As pointed out above (*supra*, pp. 22–24), there is ample evidence that the system in the instant case is retaliatory in nature.

Second, only a single carrier's dual-rate formula—not an entire conference's system—was involved in *Eden*.

Third, the excerpt is, in substance, only a dictum since the

It is of course hornbook law, especially in the field of antitrust, that many practices which are legal when done individually are nevertheless illegal when done concertedly with others. See, *e. g., Times-Picayune Co.* v. *United States*, 345 U. S. 594, 625. But the reverse proposition would surely be extraordinary—that is, that practices which are *illegal* when done individually are *legal* when done concertedly.

Yet, eleven years later in *Rawleigh* v. *Stoomvaart*, 1 U. S. S. B. 285 (1933), essentially that holding was made by the Board. In ruling that its *Eden* decision was inapplicable to a conference agreement, the Board emphasized (*id.*, pp. 290–291) that a dual-rate formula, when used jointly by members of an entire conference instead of by only a single carrier, gave a shipper a "choice of the carriers" *once the shipper had signed the required exclusive patronage contract.* Because of this "choice", a conference dual-rate system—the Board reasoned—was not subject to the same legal infirmity as a dual-rate formula used by a single carrier.

The distinction thus drawn by the Board was rejected in *Intercoastal Investigation*, 1 U. S. S. B. 400, 452 (1935), on the ground that "to permit the members of the Gulf conference to publish and charge

---

Board's basic holding is that the dual-rate formula involved there was invalid under Sections 16 and 17.

Fourth, even assuming that the excerpt could be read as holding that an entire conference's dual-rate system does not violate Section 14, Third, such a system would nevertheless be plainly invalid under Sections 16 and 17 as those provisions were construed by the Board in *Eden*. See fn. 14, *supra*.

rates depending upon the execution of exclusive patronage contracts would be permitting them to do collectively what carriers individually are prohibited from doing."[29] See also *Contract Routing Restrictions*, 2 U. S. M. C. 220, 226–227 (1939). But this rationale, as Judge Frank pointed out,[30] has in turn been rejected by later decisions of the Board.

The *Rawleigh* decision was the first in which the Board upheld the legality of a conference dual-rate system.[31] In view of the lapse of seventeen years from the enactment of the statute until the case was decided, in view of the decision's sharp departure from *Eden*, and in view of the varied treatment of *Rawleigh* in subsequent Board decisions, *Rawleigh* can

[29] In *Intercoastal*, where the dual-rate system involved there was held to violate Sections 16 and 18, the Board stated (p. 456):

"The prohibition of discrimination means, among other things, that no difference or distinction shall be made in rates that coerce the public to employ one competitor to the exclusion of another, or deprive one competitor of business which under freedom of selection by the public would be given to it, and thus create a monopoly in favor of another competitor."

Plainly, if the statute prohibits any "difference * * * in rates that coerce[s] the public to employ one competitor to the exclusion of another, or deprive[s] one competitor of business which under freedom of selection by the public would be given to it," the Act necessarily prohibits a system which, under the threat of penalty rates, coerces shippers into giving all their business to members of the conference.

[30] See *supra*, note 27, pp. 890–891, fn. 22.

[31] Indeed, not even the *Rawleigh* decision approved the use of a conference dual-rate system as a weapon against nonconference competition. On the contrary, the Board carefully pointed out that the contracts involved there permitted contract shippers to use "not only the 10 conference members but also a nonconference line, the Isthmian line, the only other line regularly in the trade" (p. 290).

scarcely be treated as an authoritative exposition of congressional intent. On the contrary, if Board rulings are to give any weight in that respect, it would appear that they support the decision of the court below, inasmuch as the Board's ruling in *Eden*—decided only six years after enactment of the statute—recognized that a dual-rate formula is unlawful even when used only by a single carrier.

Moreover, in determining the weight to be given to the Board decisions on this matter, it is important to recognize that valid Board approval of the dual-rate system would exempt this anticompetitive device from the antitrust laws. This Court has pointed out (*Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U. S. 61, 74) that, "Although due consideration is to be accorded to administrative construction where alternative interpretation is fairly open, it is our duty to reconcile such interpretation, except where Congress has told us not to, with the broader antitrust policies that have been laid down by Congress." One of those policies is that "[u]nder the Sherman Act 'competition not combination, should be the law of trade' " (*Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U. S. 457, 465)—particularly where, as here, the combination seeks to use its combined economic power against independent competitors.

E. THIS COURT HAS NOT PASSED ON THE VALIDITY PER SE OF THE DUAL-RATE SYSTEM

Petitioners urge (Br. No. 73, pp. 62–69; Br. No. 74, pp. 50–66) that this Court already has determined that the dual-rate system is not illegal *per se* under

Section 14, Third of the Act. They rely on three cases: *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474; *Swayne & Hoyt* v. *United States*, 300 U. S. 297; *Far East Conference* v. *United States*, 342 U. S. 570. In none of them did this Court explicitly decide the question. Two of them, *Cunard* and *Far East*, held that the dual-rate system could not be directly challenged in an antitrust suit, but that the Board's primary jurisdiction must be invoked by filing a complaint under the Shipping Act. *Swayne & Hoyt* did not involve the validity of the dual-rate system under Section 14, Third, but the correctness of the Board's finding that a particular dual-rate system violated Section 16 of the Act.

We submit that the Court of Appeals correctly concluded (R. 244) that "the cases do not decide the point," even inferentially. Indeed, it is hardly likely that this Court would have determined a question which the Conference itself has characterized as "of Paramount Public Importance" (Petition for Writ of Certiorari, No. 740, 1956 Term, p. 9) without explicitly so stating and without fully enunciating the basis for its ruling. We believe that in each of these cases the Court found it unnecessary to reach the question of *per se* illegality: in two of them on the ground that the matter first should be passed upon by the Board, and in the third on the ground that the Board's action in invalidating the particular system could be upheld on a narrower ground without reaching the broad issue.

In the *Cunard* case, the District Court had dismissed a bill by a steamship company seeking to

enjoin, as violations of the Sherman and Clayton Acts, a conference from using a dual-rate system, on the ground that "the matters complained of were within the exclusive jurisdiction of the United States Shipping Board * * *" (284 U. S. at 478–479). In affirming, this Court applied the rule of "primary jurisdiction," previously developed in proceedings under the Interstate Commerce Act, "that questions essentially of fact and those involving the exercise of administrative discretion, which were within the jurisdiction of the Interstate Commerce Commission, were primarily within its exclusive jurisdiction, and, * * * that a remedy must be sought from the Commission before the jurisdiction of the courts could be invoked" (p. 481). The Court pointed out (p. 485) that the allegations in the bill "either constitute direct and basic charges of violations of these provisions [Sections 14, 16, and 17 of the Shipping Act, pp. 483–484] or are so interrelated with such charges as would be in effect a component part of them; and the remedy is that afforded by the Shipping Act, which to that extent supersedes the antitrust laws." The Court rejected the argument that resort to the Shipping Board was unnecessary since "the agreement referred to in the bill of complaint cannot legally be approved," primarily on the ground that "whatever may be the form of the agreement, and whether it be lawful or unlawful upon its face, Congress undoubtedly intended that the Board should possess the authority primarily to hear and adjudge the matter. For the courts to take jurisdiction in advance of such hearing

and determination would be to usurp that authority" (p. 487).[32]

Cunard thus held only that, as long as the allegations upon which the complaint under the antitrust laws was grounded also constituted violations of the Shipping Act, resort initially must be had to the Board, whether "the agreement * * * be lawful or unlawful on its face."

The *Far East* case presented the identical issue, except that the antitrust suit was brought by the Government rather than by a private party. The Court, upon the authority of the *Cunard* case (342 U. S. at 573), held that the matter lay within the Board's primary jurisdiction. It ruled (p. 574) that the matter should be referred to the Board, "even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined."

Cunard and *Far East* held only that initially the Board, and not the courts, should pass upon the legality of the dual-rate system under the Shipping Act. But that surely was not equivalent to holding that the Board could approve the system. On the contrary, one of the basic considerations underlying the related doctrines of primary jurisdiction and exhaustion of administrative remedies is the very real possibility

[32] The Court also pointed out (*ibid.*): "Moreover, having regard to the peculiar nature of ocean traffic, it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications."

that factual issues in the case might render unnecessary the adjudication of broader legal questions (such as the *per se* validity of the dual-rate system). See, *e. g., Aircraft & Diesel Equipment Corp.* v. *Hirsch,* 331 U. S. 752, 772–774. In addition, even if it should develop that such adjudication is unavoidable after resolution of the factual issues, the agency's analysis of the latter issues will nevertheless provide a concrete background for judicial review of the broader legal questions. Thus, in *Cunard* and *Far East,* the Court presumably wished to have the benefit of the Board's views on such questions as whether there is any difference in the services received by the two shippers who pay the different rates, whether the different rates reflect differences in costs to the conference in serving signing and non-signing shippers, and whether rates in the trade have been stable despite the absence of the dual-rate system. All of those issues were determined by the Board in this case, and it was such an appraisal of the facts which "serve[s] as a premise for legal consequences to be judicially defined," namely, whether the system is illegal on its face.[33]

[33] The fact that the dissenting Justices in *Far East* (in urging that the matter need not be referred to the Board) stated that the dual-rate system was illegal under Section 14, Third (pp. 578–579), does not indicate, as the Conference contends (Br. No. 74, p. 57), that the majority impliedly rejected that view. The majority merely concluded that judicial determination of the question should await "preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts" for determining "issues of fact not within the conventional experience of judges * * *" (pp. 574, 575). In contrast, the dis-

In the third case upon which petitioners rely, *Swayne & Hoyt,* the validity of the dual-rate system under Section 14 was not in issue. The Court upheld the Board's finding that the dual-rate system there involved violated Section 16 of the Act, which makes it unlawful to give "undue or unreasonable" preference or advantages. Since the Court upheld the administrative finding that on the particular facts of that case the system could not be approved, it had no occasion to pass upon the broader issue of the system's *per se* illegality. It cannot be deemed, as the Conference states (Br. No. 74, p. 60), to have "rejected the theory of illegality *per se* which underlay the District Court decision," or to have enunciated the principle that "the legality of dual-rate systems involves a factual determination in each case and that the Board's conclusions in each case must stand 'if there is evidence to support them'." [34]

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senting Justices rejected the majority's view that the doctrine of primary jurisdiction was applicable to the facts of the case.

[34] Nor is there any basis for the Conference's contention (Br. No. 74, p. 62) that footnote 3 to the opinion (300 U. S. at 307) "constitutes a holding that dual-rate systems are not illegal *per se* under § 14, Third" (a provision of the Act not then before the Court). The footnote was to a passing statement by the Court that "the operation of the contract system, in the circumstances of this case, does not differ substantially from that of 'deferred rebates' outlawed in both foreign and coastwise shipping by § 14" (300 U. S. at 307). The footnote suggested that the Alexander Report "did not condemn the contract system completely" (*ibid.*). As has been pointed out, *supra*, p. 42, n. 20, the Court appears inadvertently to have treated a statement of a *contention* in the Report as if it were a statement of the Committee's *conclusions*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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OCTOBER 1957.

APPENDIX

The Shipping Act, 1916, 39 Stat. 728, as amended, 46 U. S. C. 801, *et seq.*, provides in pertinent part as follows:

SEC. 14. That no common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country,—

First. Pay, or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow, a deferred rebate to any shipper. The term "deferred rebate" in this Act means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term "fighting ship" in this Act means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing or reducing competition by driving another carrier out of said trade.

Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommo-

dations when such are available, or resort to other discriminating or unfair methods because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

Fourth: Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims. [46 U. S. C. 812.]

* * * * *

SEC. 15. That every common carrier by water, or other person subject to this Act, shall file immediately with the Federal Maritime Board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Board may by order disapprove, cancel, or modify any agreement, or any modification

SEC. 17. That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. * * * [46 U. S. C. 816.]

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or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the Board shall be lawful until disapproved by the Board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the Board.

All agreements, modifications, or cancellations made after the organization of the Board shall be lawful only when and as long as approved by the Board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," and amendments and Acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action. [46 U. S. C. 814.]

SEC. 16. That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this Act.

Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense. [46 U. S. C. 815.]

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Nos. 73 and 74

In the Supreme Court of the United States

OCTOBER TERM, 1957.

FEDERAL MARITIME BOARD, PETITIONER

v.

ISBRANDTSEN COMPANY, INC., ET AL.

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX TO BRIEF FOR THE UNITED STATES AND THE SECRETARY OF AGRICULTURE AND BRIEF FOR THE FEDERAL MARITIME BOARD CONTAINING EXCERPTS FROM H. DOC. NO. 805, 63D CONG., 2D SESS.

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D. C.
E. ROBERT SEAVER,
General Counsel,
Federal Maritime Board, Washington 25, D. C.

Excerpts From Proceedings and Report of House Committee on Merchant Marine and Fisheries in the Investigation of Shipping Combinations Under H. Res. 587, 62d Cong., 2d Sess., H. Doc. 805, 63d Cong., 2d Sess.

PREFATORY NOTE

All of the briefs in this case refer, in various ways, to the so-called Alexander Report. Because of the difficulty of obtaining copies of the document, the Solicitor General and the Federal Maritime Board—although disagreeing on the merits—consider that it might be helpful to the Court to have readily available those portions principally cited in their briefs. The submission of this material, however, carries with it no implication as to its relevance or significance in the legislative history of the Shipping Act, 1916.

The Alexander Report is organized into the following divisions (with page of this Appendix indicated).

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Respectfully submitted.

J. Lee Rankin,
Solicitor General.

E. Robert Seaver,
General Counsel,
Federal Maritime Board.

446420—57——1

[3] [H. Res. 587, Sixty-second Congress, second session.]

Resolved, That the Committee on the Merchant Marine and Fisheries be, and is hereby, empowered and directed to make a complete and thorough investigation of the methods and practices of the various ship lines, both domestic and foreign, engaged in carrying our oversea or foreign commerce and in the coastwise and inland commerce, and the connection between such ship lines and railroads and other common carriers, and between such lines and forwarding, ferry, towing, dock, warehouse, lighterage, or other terminal companies or firms or transportation agencies, and to investigate whether any such ship lines have formed any agreements, understandings, working arrangements, conferences, pools, or other combinations among one another, or with railroads or other common carriers, or with any of the companies, firms, or transportation agencies referred to in this section, for the purpose of fixing rates and tariffs, or of giving and receiving rebates, special rates, or other special privileges or advantages, or for the purpose of pooling or dividing their earnings, losses, or traffic, or for the purpose of preventing or destroying competition; also to investigate as to what methods, if any, are used by such ship lines, foreign or domestic, and railroads and other common carriers, or of any of the companies, firms, or other transportation agencies referred to in this section, to prevent the publication of their methods, rates, and practices in the United States; also to investigate and report to what extent and in what manner any foreign nation has subsidized or may own any vessels engaged in our foreign commerce; also to investigate and report to what extent any vessel lines and companies, or any of the companies, firms, or transporta-

tion agencies referred to in this section, engaged in our foreign or coastwise or inland commerce, are owned or controlled by railway companies, by other ship lines or companies, or by any of the companies, firms, or transportation agencies referred to in this section, or by the same interests and persons owning or controlling railroad companies, ship lines, or other common carriers, or any of the companies, firms, or transportation agencies referred to in this section; and said committee shall further investigate whether the conduct or methods or practices of said foreign steamship lines are in contravention of our commercial treaties, or in violation of our laws, and what effect said methods and practices have on the commerce and freight rates of the United States; and shall further investigate what effect such combinations, agreements, understandings, working arrangements, and practices of railroads and our coastwise and inland shipping lines, or of railroads and such shipping lines and any of the companies, firms, or transportation agencies referred to in this section, or of railroads and oversea shipping lines, whether domestic or foreign, if any are found to exist, have on the commerce and freight rates of the United States, and whether the same are in violation of the laws of the United States.

* * * * *

[4] TESTIMONY OF MR. SIDNEY STORY, VICE PRESIDENT OF THE PAN AMERICAN MAIL STEAMSHIP CO., NEW ORLEANS, LA.

* * * * *

[35] Mr. HARDY. There is just one other question I would like to ask you, Mr. Story. I presume that in your interest you have probably consulted attorneys and gotten possibly some legal idea as to any legitimate remedy for the situation. Have you any sug-

gestion of some definite remedy, or has that suggestion been thought of by any attorneys that you communicated with?

Mr. STORY. Everybody that I have had any discussion with—business men as well as attorneys—seems to be of the opinion that the only cure for the conditions now prevailing is legislation of some character that will absolutely prevent rebating, prohibit combinations, that will penalize the shipping that engages in illegitimate combinations in restraint of trade or fosters monopoly in some form, along lines such as were discussed here this morning.

Mr. HARDY. In other words, to make it penal for a combination to penalize an individual?

Mr. STORY. Absolutely; and compel that shipping, whether foreign or domestic, to accept cargo from the shippers when offered.

Mr. HARDY. On equal terms?

[36] Mr. STORY. On equal terms, because, as I understand from conversations had with people in Brazil, they fear that if they patronize an independent, the conference line or combination will penalize them to the extent of not only refusing to pay the rebates under the contract, but refusing to take their cargoes.

* * * * *

[85] TESTIMONY OF MR. WILLIAM LOWRY

The witness was duly sworn by the chairman.

The CHAIRMAN. Please give the stenographer your name and address and your business.

Mr. LOWRY. My name is William Lowry; address, New Orleans, La. Until lately I was the representative of the Pan-American Mail in South America, in Rio and Buenos Aires. * * *

* * * * *

[87] The CHAIRMAN. Tell the committee just exactly what you found out.

Mr. LOWRY. I found that no shipper would ship on an outside line to the United States for two reasons: If he was a large shipper he already had owing him a sum of money in deferred rebates which would more than balance any saving that he might make on a shipment on our steamer. That was one reason. The smaller shipper was afraid to ship on our vessels, because although he did not have so much money owing him in rebates, he was afraid that the next time he came along and wanted a ship, they would say, "There is no room in this vessel for you," or "We are very sorry that we have not a vessel to meet the engagement that you wish," or find some very polite way of not taking his coffee. Those are the two reasons.

* * * * * *

[94] TESTIMONY OF WILLIAM HARRIS DOUGLAS, OF ARKELL & DOUGLAS (INC.), 317 WEST SEVENTY-SIXTH STREET, NEW YORK CITY

The witness was duly sworn by the chairman.

The CHAIRMAN. Mr. Douglas, you give your name and address and business in which you are engaged to the committee, please.

Mr. DOUGLAS. William Harris Douglas. I am engaged in the export business through South America and other parts of the world.

* * * * * *

[97] EXHIBIT 26

Memorandum of freight contract made this 1st day of May, 1912, between the R. P. Houston & Co., party of the first part, and Messrs. Arkell & Douglas (Inc.), party of the second part, for their entire shipments from New York to Montevideo.

La Plata, Buenos Aires, Rosario, and Bahia Blanca from date to April 30, 1913, included

Party of the first part agrees to provide tonnage for all shipments which party of the second part has for shipment, provided reasonable notice of intention to ship (I say 20 days) is given, at the following rates of freight:

	Cents
1. Harvesters, headers, binders, header binders, reapers, mowers, hay rakes, drills, stackers, seed sowers, corn pickers, hand grain shellers and parts thereof, carts, harrows, plows (except traction engine gang plows)	16
2. Cleaners, hay presses, grain mills, grain planters, land rollers, pulverizers	18
3. Wheelbarrows, shovels, spades, hay forks	20
Chairs, desks, and common furniture	17½
4. Windmill material	19
5. Agricultural engines and thrashers, including gas engines, traction and gang plows:	
Up to 3 tons	20
Over 3 tons	22
6. Binder twine, per bale	28
7. Machinery, up to 2 tons	20
8. Lubricating oil (till Dec. 31)	15
9. Automobiles:	
Not exceeding 2 tons (till Dec. 31)	15
Over 2 tons (till Dec. 31)	18
10. Sewing machines (till Dec. 31)	14
11. General cargo not otherwise enumerated, current rates at time of shipment.	

* * * * *

Rates on goods not covered by above agreement weighing over 4,400 pounds are to be mutually agreed to between the parties hereto.

* * * * *

It is mutually agreed and understood that this contract covers the entire shipments of Messrs. Arkell & Douglas (Inc.), estimated to amount to about [98] ——tons from New York to the River Plate ports, and shipments shall only be made by steamers designated by R. P. Houston & Co.

It is further agreed that in case R. P. Houston & Co. reduce the rates of freight to any other shipper or shippers on any of the articles above mentioned during the period covered by this contract, then Messrs. Arkell & Douglas (Inc.) to be accorded the benefit of all such reductions during the period that said rates are reduced.

R. P. HOUSTON & CO.,
Per E. HALM.

* * * * * *

[108] Mr. HUMPHREY. I have seen testimony given by the representatives of the steamship lines that they give special rates to all three of those you have mentioned.

Mr. DOUGLAS. I think that is right.

Mr. HUMPHREY. The Steel Trust, the Harvester Combine, and the oil people. The reason they give for it is that they say those interests are so powerful that if they do not do it they will put on their own vessels.

Mr. DOUGLAS. That is the selfish reason that should not obtain here, because that is what you gentlemen are here to protect us from, I hope.

The CHAIRMAN. Yes; there is no reason why they should receive that.

Mr. DOUGLAS. No; I have always claimed that a contract for freight was not taken with a view of taking it at a lower rate particularly. It is taken by the different lines that run vessels for the purpose of holding that themselves rather than having an independent shipment that would come along month to month on the market that would tend to disorganize affairs. That is, it was a strength and an advantage to the line to hold that freight; and if it made some slight concessions in taking it, covering, say, 12 months, they did it for that purpose. And under those circum-

stances every line that runs to a foreign country should be compelled, if it chooses to protect itself in that way, to give to every other shipper of a similar class of goods the same contract rate which it makes with that party for that purpose at the time, say, year by year.

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[119] TESTIMONY OF MR. ALLERTON D. HITCH, TREASURER, HAGEMEYER TRADING CO., EXPORT AND IMPORT COMMISSION MERCHANTS, 17 BATTERY PLACE, NEW YORK.

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[125] Mr. HUMPHREY. I remember an instance where the manufacturers of doors, I think it was, on the Pacific coast investigated by sending some of their products to South America, and the man they sent to look into it reported that he found very great discrimination in the way of making this charge, and if they sent them there by a vessel other than the conference lines that they might get there on time, but they would not agree that they would be able to discharge their cargo in less than 30 days.

* * * * *

Mr. HITCH. No. I do not know anything about the discriminations. I do know that in the South of Brazil the lighters are mostly owned by the Hamburg-South American Line, and that may account for the fact.

Mr. HUMPHREY. I remember that incident, and the agent reporting that would be one very serious objection, among other things, to cause his firm not to undertake to send their products down there.

Mr. HITCH. They probably had to lighter everything?

Mr. HUMPHREY. Yes.

Mr. HITCH. And it was a question of the lighterage ontract with the steamship company.

Mr. HARDY. In other words, that the lighterage supplied by the Hamburg company to the outside required payment of a heavy due.

Mr. HITCH. The lighters would probably be all busy.

* * * * *

135] The CHAIRMAN. You think that rebates should e prohibited absolutely?

Mr. HITCH. Yes, sir; I do.

The CHAIRMAN. Without any discrimination between shippers; that is, that they should all be treated like?

Mr. HITCH. I do not believe in discrimination. I hink they should all be treated alike, although I do ot think that the man who ships occasionally a few dds and ends should expect to get quite as good treatnent or service as the man who ships an enormous uantity.

The CHAIRMAN. But should that be the subject of rivate, secret negotiations between the parties?

Mr. HITCH. No; I do not think so.

The CHAIRMAN. But should be provided for under roper Governmental regulation?

Mr. HITCH. Exactly. I think there should be a ariff that should not be deviated from.

* * * * *

137] TESTIMONY OF MR. JOHN C. SEAGER

* * * * *

138] The CHAIRMAN. How long has that combination existed?

Mr. SEAGER. In the Brazil trade?

The CHAIRMAN. Yes.

Mr. SEAGER. Since 1895 or 1896.

The CHAIRMAN. Now, state briefly to the committee the substance of the working agreement between those lines.

Mr. SEAGER. From the start?

The CHAIRMAN. No; not as it was modified from time to time, but generally what was the agreement?

Mr. SEAGER. It was a rebate business, a deferred rebate business, and pooling.

The CHAIRMAN. Pooling, to what extent?

Mr. SEAGER. Pooling of freight and pooling of the commissions of the agents.

Mr. HUMPHREY. Did you pool your earnings?

Mr. SEAGER. Yes, sir; we pooled the earnings. The owners obliged us to pool our earnings.

[139] Mr. HUMPHREY. Did you have any agreement in regard to what action you would take toward competitors if any independent line came up?

Mr. SEAGER. Yes, sir; we occasionally got instructions to put on a fighting boat.

Mr. HUMPHREY. What do you mean by a fighting boat?

Mr. SEAGER. Some boat, a steamer placed on the berth to compete against another man who was opposing us and to take freight so low that we put him out of business.

Mr. HUMPHREY. Then suppose you sustained a loss, was that divided up between the different lines in proportion?

Mr. SEAGER. Yes, sir; the owners used to divide that among themselves according to the percentage they had in the pool.

* * * * *

[141] Now, my trouble was, what these gentlemen have all been complaining of, rebates and the tying up of the coffee shippers. I thought I would watch.

I watched because their end of the year is the 1st of July. After the 1st of July I noticed the people who had the least amount of rebates due, and gradually worked my way into them. I got several people, and I was getting a fair share of the business with all those drawbacks.

* * * * *

January 9, 1913

[153] TESTIMONY OF MR. LORENZO DANIELS, NEW YORK CITY

The witness was duly sworn by the chairman.

The CHAIRMAN. Mr. Daniels, give the committee your name, address, and the business in which you are engaged.

Mr. DANIELS. My name is Lorenzo Daniels, 301 Produce Exchange. Our business is that of general merchants.

The CHAIRMAN. What shipping lines or companies do you represent?

Mr. DANIELS. We have had several agencies, but the only active one at the moment is the Lamport & Holt Line.

* * * * *

[155] In the matter of freight contracts, each line trades for its own boats that may be loading and for boats scheduled for a period of three months ahead. Contracts beyond three months are generally made for joint account, each line assuming a one-third liability; contracts for large amounts of staples are also made jointly, each line assuming a one-third responsibility.

* * * * *

[202] The CHAIRMAN. Explain what kind of contracts you have with reference to your shipments in the Brazilian trade.

Mr. DANIELS. In the Brazilian trade we have a contract for locomotives with the Baldwin Locomotive Works; we have a contract with the Singer Sewing Machine Co. for their goods; we have a contract with the Barbour Asphalt Co. for their goods; and we have a contract with the Rio Tramway Co. for their shipments.

The CHAIRMAN. Have you any contract with any other sewing-machine company for their goods?

Mr. DANIELS. I think not. I think there are a few others. There are those few contracts in the Brazilian trade.

The CHAIRMAN. Have you a contract with the New Home Sewing Machine Co. for their goods?

Mr. DANIELS. I think not.

The CHAIRMAN. Have you any with the International Harvester Co.?

Mr. DANIELS. No, sir; they do not ship to Brazil.

The CHAIRMAN. Have you a contract with the United States Steel Corporation?

Mr. DANIELS. We only have a specific contract for some specific line of goods. I do not know whether we have one running now. We have contracts for 25,000 tons of rails. We may have one now for 2,000 or 3,000 tons. I think that is the only contract on our record. The others have been fulfilled. We have car contracts.

The CHAIRMAN. Please explain to the committee the nature of those contracts. Take for instance the one with the United States Steel Corporation.

Mr. DANIELS. That would be a specific contract for a specific amount of freight at a specific rate. The last contract I have in mind was for 25,000 tons of rails.

The CHAIRMAN. You have no continuing contract with them, have you?

Mr. DANIELS. We have no continuing contract at all, sir.

The CHAIRMAN. You make a new contaract (sic) to cover each specific shipment, do you?

Mr. DANIELS. No; we only contract for large quantities. If their shipments are small they pay the tariff rate, make a contract as I explained to you for berth boats, as they are loading with each line, separate contracts.

[203] The CHAIRMAN. But for the large shipments you make them a special or a reduced rate, below the regular tariff rate, do you not?

Mr. DANIELS. No, sir. Take rails, there is not a fixed tariff; it fluctuates, but if we made a contract today with the steel company for 50,000 tons of rails, and anybody else had 10,000 tons of rails, we would make the same rate for the same contract. There is no discrimination.

The CHAIRMAN. There is no discrimination in favor of the large shipper as against the small shipper.

Mr. DANIELS. There is no discrimination in favor of the large shipper against the small shipper.

The CHAIRMAN. I understood you to say you had a contract with the Singer Sewing Machine Co.?

Mr. DANIELS. We have a contract with the Singer Sewing Machine Co. running, I think, through this next year, for all their goods at a fixed rate.

The CHAIRMAN. Is not that a rate less than your regular tariff rate?

Mr. DANIELS. Have you the tariff before you here?

The CHAIRMAN. No; we have not.

Mr. HUEBNER. You did not send us the Brazilian tariff.

Mr. DANIELS. I think we did. Yes; I am sure we did.

At this point Dr. Huebner handed a paper to the witness.

Mr. DANIELS. This is not the one. Our contract is higher than those rates. If you will allow me to ask my colleague, Mr. Gerhard—I do not think I remember exactly what the rate is. [To Mr. Gerhard:] Was it 20 cents a thousand?

Mr. GERHARD. I do not know the present rate.

Mr. DANIELS. In any case, whatever contract we have with the Singer Sewing Machine Co. for the year is in the neighborhood of 20 cents.

Mr. GERHARD. It was made some time ago.

Mr. DANIELS. It is immaterial. I can look it up for you. We would give anybody else the same rate in a similar contract; no discrimination whatsoever.

The CHAIRMAN. Would you give the New Home Sewing Machine Co. the same rate that you give the Singer Sewing Machine Co.?

Mr. DANIELS. We would, for a contract; yes, sir.

The CHAIRMAN. Do you do it?

Mr. DANIELS. I do not know whether they ship by us.

The CHAIRMAN. What?

Mr. DANIELS. I do not know whether they ship at all, to answer the direct question; but any sewing-machine company could make a contract with us in the same way.

The CHAIRMAN. Could you ascertain and send us the rates charged the United States Steel Corporation and the Singer Sewing Machine Co.?

Mr. DANIELS. Yes, sir.

The CHAIRMAN. And the New Home Sewing Machine Co., if they do ship via your line?

Mr. DANIELS. Yes, sir; we will be very glad to do that.

The CHAIRMAN. The contracts by these various shippers with your lines bind them to use your line exclusively?

[204] Mr. DANIELS. I think that the Singer contract is for all of their shipments.

The CHAIRMAN. Will you be kind enough to furnish a copy of your contract with the Singer Sewing Machine Co.?

Mr. DANIELS. We will be glad to; yes, sir.

The CHAIRMAN. Also with the other companies to which you referred.

Mr. DANIELS. With pleasure.

The CHAIRMAN. I think we called for them, and you will see if you have them. I call your attention to the fact that this clause of the subpoena duces tecum reads:

> And the said Lorenzo Daniels is hereby commanded to make diligent search for and produce any papers, data, or documents whatsoever in his possession, under his control, at his command, or that can be obtained by him, covering a period of three years next before this date, touching the following:
>
> (1) Any agreements (originals, copies, or in the form of correspondence or other data) between the Lamport & Holt Line and any other steamship company or companies operating between (a) New York and Brazilian ports; (b) New York and La Plata, Montevidio (sic), Buenos Aires, and Rosario, or between New York and any of these ports, and having for their purpose the fixing of rates or tariffs, the giving of rebates, special rates or privileges, the fixing of dates of sailing, the pooling of earnings or losses, the dividing of business or territory, or providing for the payment of deferred rebates to shippers.

Mr. DANIELS. We will be glad to send you a copy of the contract, but none of them correspond to that.

We give no rebates, nor do we give any privileged contracts at all.

The CHAIRMAN. We would like to see a copy of the contracts; they will speak for themselves.

Mr. DANIELS. We would be glad to furnish them, sir.

Mr. STEPHENS. Mr. Daniels, is the contract with the Singer Sewing Machine Co. for any less than the open rate that you charge on similar goods?

Mr. DANIELS. I tried to ascertain by looking at the tariff you have there—our present tariff is apparently changed. I think our contract is higher than that.

Mr. STEPHENS. You can not answer that?

Mr. DANIELS. I can not answer that without looking it up.

The CHAIRMAN. I understand the tariffs you sent us are the tariffs in force now?

Mr. DANIELS. They were in force when we sent them to you.

The CHAIRMAN. Are they in force now?

Mr. DANIELS. Well, practically; we constantly change the different rates on different articles, and I will not be sure whether we made any change in the tariffs as a whole since the date we sent it to you. It is possible we have. I will be very glad to look that question up and advise you.

The CHAIRMAN. Well, is it not a fact that that same printed tariff is issued by the other conference lines?

Mr. DANIELS. The same printed tariff is used by all the lines; yes, sir.

The CHAIRMAN. And they are identical in form and in rates?

Mr. DANIELS. Identical in form and rates; yes, sir. They are made up by a committee of the different lines revising them.

The CHAIRMAN. In conference?

[205] Mr. DANIELS. In conference, as I told you this morning.

The CHAIRMAN. Where are they made in fact, in London or New York?

Mr. DANIELS. The European tariffs are transposed to dollars and cents in New York.

The CHAIRMAN. But as they come to you from London they are in pounds, shillings, and pence?

Mr. DANIELS. Either that or they come to us from Germany. I think lately we are receiving them in the German language.

The CHAIRMAN. But you simply translate them into our terms?

Mr. DANIELS. To the equivalent in dollars and cents.

The CHAIRMAN. Otherwise they are fixed either in London or in Germany?

Mr. DANIEL. Yes, sir; we adopt the same rates.

The CHAIRMAN. Tell us a little more in detail about the work of this committee—just what you do, and what your powers are, and all about it.

Mr. DANIELS. It is pretty difficult to convey to you very much of an idea, from the fact that it has not been necessary for the principals to come together for over a year. I have not attended a conference in a year. My colleagues make the reports of the amount of cargo—the division of contracts—and qualify in this work of adapation of rates, etc. There are no discretionary powers in the New York conference that it has been necessary to act upon. I do not think we have any—we cable——

The CHAIRMAN. You say you have no discretionary powers?

Mr. DANIELS. Practically no discretionary powers.

The CHAIRMAN. You get your orders from the conference abroad?

Mr. DANIELS. From the conference abroad.

The CHAIRMAN. So that those cables come interchangeably to all the conference lines here?

Mr. DANIELS. They come to our conference office.

The CHAIRMAN. Yes.

Mr. DANIELS. We have a chap who circulates them around to the other lines, and if any one of the lines want to send a cable we generally send for him, and he takes our copy of it and submits it to the others for their approval and signature.

The CHAIRMAN. All of it is sent?

Mr. DANIELS. All of it is sent, so that we all know it comes through that way.

The CHAIRMAN. And when a cable comes from abroad it is treated by all conference lines jointly.

Mr. DANIELS. Yes.

The CHAIRMAN. Is it not also a part of the duty of this committee and conference to keep track of the traffic and distribute it as nearly as may be between the different conference lines?

Mr. DANIELS. No; we do not distribute the traffic at all in New York, except contracts that we have taken jointly, with a third liability to carry and transport.

The CHAIRMAN. Are there any contracts made with these shippers whom you have mentioned and others that are not joint contracts; that is, I mean joint on the part of the conference lines with the individual shipper?

[206] Mr. DANIELS. Any contract that is made for a specific sailing, or up to a period of three months, within which period generally the boats are named; those contracts would be made, each line for its own steamer, irrespective of any other line. If it was an extended contract, or a contract in very large volume, where the other lines join, it would be made con-

jointly. A yearly contract, such as the Singer contract, covering a year, I think, is made conjointly—made by one in behalf of all.

* * * * *

[213] Mr. HUMPHREY. I understood you a while ago that you had a contract with the Singer Sewing Machine Co. but that other shippers of sewing machines could send their product at the same rate if they so desired.

Mr. DANIELS. If they desired to contract.

Mr. HUMPHREY. What was the purpose of making that special contract with the Singer Sewing Machine Co.?

Mr. DANIELS. The Singer Sewing Machine Co. have a very large business in Brazil. It is Brazil we are speaking about, is it not?

Mr. HUMPHREY. Yes.

Mr. DANIELS. In Brazil. And they have sales agents who are making forward sales all the time, and they like to be able to make their sales on a fixed cost. A great many of their contracts are made with houses in Brazil by the year, they know the volume of their business, and it makes it a certainty when they have the transportation at a fixed rate.

Mr. HUMPHREY. And so, owing to the large amount of business, you are naturally anxious to get it?

Mr. DANIELS. We are naturally anxious to facilitate their business. We would get it anyhow, presumably, if there was no opposition.

Mr. HUMPHREY. They agree in their contract not to ship by any other lines?

Mr. DANIELS. No; they agree to give us all of their freight, Mr. Humphrey. It may be the same thing, but it is the same thing with a difference. If you will give me the questions without the answers tagged onto them we will get on very much quicker.

Mr. HUMPHREY. I have no objection to a discrimination if there is a difference. They may patronize the other line, but they must give you the freight.

Mr. DANIELS. They contract to do it.

Mr. HUMPHREY. What concessions do you give to them to induce them to do that?

Mr. DANIELS. We give them this yearly contract. That is all.

Mr. HUMPHREY. They get no advantage any other way?

Mr. DANIELS. They get no advantage any other way.

Mr. HUMPHREY. You are not giving them any lower rate than you are giving their competitors?

Mr. DANIELS. No lower rate than we are giving any other competitor that would want to contract. Let me put it that way.

Mr. HUMPHREY. Under that contract do you, as a matter of fact, carry the Singer sewing machines for less than you carry other machines?

Mr. DANIELS. If the market goes up we would be caught with a bad contract on our hands.

[214] Mr. HUMPHREY. Yes; but you do not quite understand my question. We will take, for illustration, some other sewing machine, the Home or any other company. Unless they make a special contract you do charge them more, do you not?

Mr. DANIELS. Not necessarily. It all depends on the going tariff or the value of the service. If the market is going up or the rates go up.

Mr. HUMPHREY. Have you a contract with any other sewing machine manufacturer, outside of the Singer?

Mr. DANIELS. To Brazil—I think not.

Mr. HUMPHREY. You have no agreement with any other that would come in competition with the Singer in your field?

Mr. DANIELS. I do not think so in Brazil. In the Plate I think there are others that have contracted.

Mr. HUMPHREY. The only other line to South America in the same trade as your line is the Prince Line, is it not?

Mr. DANIELS. The Lloyd Brazileiro are in the New York-Brazil trade—an independent line—and they quote cheaper freight than we do. We make no discrimination for anybody who wants to ship by them.

* * * * *

[226] Mr. DANIELS. They are not joint contracts. They are made; each line making its own contract and assuming the liability for the carrying out of that contract; but they have the privilege of shipping by other steamers than their own.

The CHAIRMAN. In other words, while the contract is made, for instance, with the Lamport & Holt Line, yet it is understood they may ship by any one of the conference lines?

Mr. DANIELS. If the shipper wants to and the conference line will take the goods.

* * * * *

[227] The CHAIRMAN. You tell the committee now whether these parties give that contract for the privilege of shipping by any one of the conference lines or by any other lines at will?

Mr. DANIELS. No; they have not.

The CHAIRMAN. They have not?

Mr. DANIELS. In our own case we have had the question raised several times where people have tried to get the benefit of contract rates when we did not have the space, and were charging higher, and when our line did not have any liability under that contract, nor have the other lines any liability or responsibility other than is voluntary under our contracts.

The CHAIRMAN. But you do recognize——

Mr. DANIELS. As a custom, unless there is some reason to the contrary, the shippers ship by what steamers they like, because the rates are about the same.

The CHAIRMAN. When you say "steamers" you mean lines in the conference?

Mr. DANIELS. Yes.

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[237] TESTIMONY OF MR. PAUL F. GERHARD, GENERAL AGENT FOR THE PRINCE LINE, NEW YORK, N. Y.

* * * * *

[241] Mr. GERHARD. * * *

It is also a part of the understanding that merchants who contract with individual lines for the shipment of large quantities of materials or for shipments during a season or a year have the privilege of loading such parts of their shipments as they may desire to load upon any steamer or steamers of any of the five lines which may be loading at the time the merchants wish to make the shipment, but subject to arrangement with the agent of the steamer, except contracts that are closed by authority of the respective agents for participation in same. The freight rates earned by each of the lines are its own, and are not pooled.

* * * * *

[246] The CHAIRMAN. Of course, you have contracts with individual shippers in these different trades?

Mr. GERHARD. Well, in some trades, yes, we have more than in others. For instance, in the African trade I have no special contracts at all. In the Brazil trade I have some contracts, and in the River Plata trade I have some contracts.

The CHAIRMAN. Have you copies of them?

Mr. GERHARD. Yes, sir. The subpoena spoke of five contracts in which we had given special privileges or advantages.

The CHAIRMAN. Yes.

Mr. GERHARD. I do not consider any of my contracts as giving any special privileges or advantages. I thought I would bring the contracts, so you can judge for yourself. In reference to the River Plata contract I should like to explain the position. We have at New York some four or five merchants—merchant houses that ship from 50,000 to 100,000 tons of agricultural machinery during the year, besides a good many other goods. These houses want contracts. They want to be prepared when their goods arrive; they want to know that the steamers are ready to take them, and they like to make a contract. So, of course, we feel that it is to our interest to make contracts. The result is that we have got into a way of making these contracts generally in the spring of the year for a year, and these houses are pretty close traders. When we finally close a contract with one of these houses, which generally is for agricultural machinery, at lower rates than our tariff rates, being such large quantities, you know, why, the other houses fall in line and close contracts on the same terms. After these big shippers have those lower rates we feel it is but right and proper that the small shippers should have the same rates, and for that reason we then offer those smaller shippers contracts on identically the same terms, so as to give them all a chance to work on the same basis. And that is the way that you find we make a good many more contracts in the River Plata trade than in these other trades.

* * * * *

EXHIBIT 34

NEW YORK, *April 26, 1911.*

The PARSONS TRADING CO.,
20 Vesey Street, New York City.

DEAR SIRS: Referring to our present freighting agreement made with you, dated November 9, 1910,

we now desire to avail ourselves of the 30-days' clause contained therein and to withdraw the present rates. [247] We beg to submit to you the following rates to cover your shipments of news printing paper and pulp board from May 26, 1911, until December 31, 1911:

* * * * *

All per ton of 2,240 pounds landed. The present agreement in all other respects remaining in force.

We have written this letter in duplicate. Kindly keep one and return the other approved by you.

Yours, faithfully,

PAUL F. GERHARD & Co.,
General Agents.

Approved.

* * * * *

NEW YORK, *November 9, 1910.*

The PARSONS TRADING Co.,
20 Vesey Street, New York City.

DEAR SIRS: We beg to confirm contract made with you on all your shipments of news printing paper and pulp board under your control from New York to Bahia, Rio de Janeiro, and Santos, Brazil, during the months of January, February, March, April, and May next, and contract to continue thereafter, subject to 30 days' notice by either party, on the following terms:

* * * * *

All per ton of 40 cubic feet, landed.

Shipments by the Prince Line and Hamburg Lines to go forward at net rates, and shipments by the Lamport & Holt Line, 10 per cent primage to be added. All other conditions as per contract made with your good selves dated February 1, 1909.

We have written this letter in duplicate. Kindly keep one and return the other approved by you.

Yours, faithfully,

PAUL F. GERHARD & CO.,
General Agents.
PARSONS TRADING CO.,
Per WM. J. SIEBERT,
Traffic Manager.

November 21, 1910.

NEW YORK, *November 12, 1910.*

The BARBER ASPHALT PAVING CO.,
Land Title Building, Philadelphia, Pa.

GENTLEMEN: We beg to confirm contract made with you today for all shipments of asphalt and residuum (in custody barrels) under your control from New York to Rio de Janeiro during the next three months, and contract to continue thereafter, subject to 30 days' notice by either party, on the following terms:

* * * * *

All per ton of 2,240 pounds, gross weight; all prepaid on signing of bills of lading and free from alongside.

Please note that the following clause will be inserted in all bills of lading, to be signed by you, viz: [248] To be taken from alongside the steamer by consignees of goods at their own risk and expense immediately the steamer is ready to deliver. Consignees to send a competent representative, who will sign receipts for each lighter load before it leaves the steamer's side, otherwise the steamer will not be responsible for any claims on the cargo. In default the goods to be landed by the agents of the steamer at expense (including dock dues) and risk of the consignees.

In the event of the consignees failing to carry out this clause, the shipper shall be held, and hereby holds, himself responsible for all expenses incurred thereby.

We have written this letter in duplicate; kindly keep one and return the other approved by you.

Yours, faithfully,

PAUL F. GERHARD & Co.,
General Agents.

Accepted by cable authority dated October 28, from Carlos A. de Miranda Jordao.

THE BARBER ASPHALT PAVING CO.,
By F. J. BUXTON, *Agents.*

NEW YORK, *January 21, 1910.*

MESSRS. GUINLE & Co.,
New York City.

DEAR SIRS: We hereby beg to confirm freight agreement made with you by us, acting for the Prince Line, Lamport & Holt Line, and Hamburg-South American Steamship Co., and Hamburg-American Line (joint service). This agreement to cover the transportation of your entire shipments of lawful merchandise from New York to ports in Brazil named below, on the following terms:

* * * * *

The steamship lines agree to provide space on receipt of ample notice of your requirements by steamers of the Prince Line, Lamport & Holt Line and Hamburg-South American Steamship Co., and Hamburg-American Line (joint service).

* * * * *

This contract to run during the current month and the three following months and to run thereafter subject to 30 days' notice of withdrawal on the part

of either party, but such notice not to be given before April 1, 1910.

Yours faithfully,

PAUL F. GERHARD & Co.,
General Agents.

Accepted:
GUINLE & Co.

This contract was canceled December 6, 1910.

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[249] EXHIBIT 35

NEW YORK, *October 2, 1912.*

Messrs. ENOCH MORGAN SONS & Co.,
439 West Street, New York City.

DEAR SIRS: We beg to confirm contract made with you today covering all your shipments of Sapolio, which you control (approximately 250 tons), hence to Montevideo and Buenos Aires, from date to January 31, 1913, inclusive, at the following rates of freight, viz: Montevideo, $10 net per ton; Buenos Aires, $11 net per ton.

All per ton of 40 cubic feet, or 2,240 pounds, steamer's option.

Freight is to be prepaid, and all shipments are subject to the terms and conditions of the regular carrying line's River Plata bills of lading.

We agree that in case the rate of freight on Sapolio is reduced you are to receive the benefit of such reduced rates during the period of such reduction.

Yours, faithfully,

PAUL F. GERHARD & Co.,
Per F. SCHARDING,
General Agents.

FS/NJM.

Accepted:
ENOCH MORGAN SONS Co.,
Per EDWIN L. VULTEE.

NEW YORK, *August 15, 1912.*

Messrs. COLLINS & Co.,
212 Water Street, New York City.

DEAR SIRS: We beg to confirm contract made with you today covering all your shipments of lawful merchandise (approximately 1,000 tons), from New York to Montevideo, Buenos Aires and Rosario, from date to April 30, 1913, inclusive, at the following rates of freight, viz:

* * * * *

All per ton of 40 cubic feet or 2,240 pounds, steamer's option.

Goods not enumerated to pay current rates.

All freight is to be prepaid, and all shipments subject to terms and conditions of the regular carrying line's River Plata bill of lading.

We agree that in case the Prince Line reduce the rates of freight to any other shipper, or shippers, on any articles named in this contract, you are to receive the benefit of such reduced rates during the period of such reduction.

Yours, faithfully,

PAUL F. GERHARD & Co.,
General Agents.

Accepted:

Collins & Co.

NEW YORK, *June 21, 1912.*

Messrs. J. WASSERMANN & Co.,
24 Stone Street, New York City.

DEAR SIRS: We beg to confirm engagement made with you today of 50,000 wine-barrel shooks, hence to Buenos Aires, at the rate of 13 cents net per cubic foot, prepaid, for shipment from October next to April, 1913, inclusive, in quantities as may be mutually arranged.

All shipments subject to the carrying line's regular bill of lading.

Yours, faithfully,

PAUL F. GERHARD & CO.,
Per H. CONNOR,
General Agents.

Accepted:

J. WASSERMANN & CO.,
PHIL. SEGALLER.

NEW YORK, *June 14, 1912.*

[250] Messrs. J. WASSERMANN & Co.,
24 Stone Street, New York City.

DEAR SIRS: We beg to confirm contract made with you today for shipment of 50,000 barrel shooks, hence to Buenos Aires, at the rate of 13 cents net per cubic foot, prepaid, as customary; to go forward in about equal monthly quantities, commencing July next, as arranged to mutual convenience.

All shipments subject to conditions of the Prince Line's regular Plata bill of lading.

Yours, faithfully,

PAUL F. GERHARD & CO.,
Per H. CONNOR,
General Agents.

Accepted:

J. WASSERMANN & CO.,
PHIL. SEGALLER.

Memorandum of freight contract made this 1st day of June, 1912, between Paul F. Gerhard & Co., agents of Prince Line, party of the first part, and Adriance, Platt & Co., party of the second part, for their entire shipments of lawful merchandise (approximately 1,000 tons), from New

York to Montevideo, Buenos Aires, and Rosario, from date to April 30, 1913, inclusive, for which the party of the first part agrees to provide tonnage, provided reasonable notice (say, twenty (20) days for lots under five hundred (500) tons and thirty (30) days for larger lots) is given.

Rates of freight as follows:

	Cents
Class 1. Agricultural machinery—say, harvesters, headers, binders, header binders, reapers, mowers, hay rakes, drills, stackers, seed sowers, cornpickers, hand grain shellers and parts thereof, carts, harrows, plows (except traction-engine gang plows)	16
Class 2. Cleaners, hay presses, grain mills, land rollers, pulverizers, grain planters	18
Class 3. Binder twine, per bale	28

General cargo and hardware and cargo not otherwise enumerated, at current rates.

All the above rates are to Montevideo and Buenos Aires.

Rates to Rosario shall be 4 cents per cubic foot, or 56 pounds, over the Buenos Aires rates, whether steamer goes direct or otherwise.

Binder twine to Rosario shall pay a freight of 6 cents per bale over the Buenos Aires rate.

All cargo, unless otherwise specified, to pay freight at per cubic foot, or 56 pounds, at steamer's option, and no piece or package is to exceed 2 tons in weight.

Parts of any of the above-mentioned articles to take the rate of the complete machine.

Rates on goods weighing over 4,480 pounds per package are to be mutually agreed between the parties hereto.

All freight is to be prepaid, and all shipments subject to terms and conditions of the regular carrying line's River Plata bill of lading.

It is further agreed that in case the Prince Line reduce the rates of freight to any other shipper, or ship-

pers, on any articles named in this contract the party of the second part shall have the benefit of such reduced rates during the period of such reduction.

PAUL F. GERHARD & CO.,
Per H. CONNOR,
General Agents Prince Line.

* * * * *

NEW YORK, *May 31, 1912.*

[251] The ANSONIA CLOCK CO.,
99 John Street, New York City.

GENTLEMEN: We beg to confirm contract made with you today covering all your shipments of clocks (approximately 10,000–15,000 cubic feet) hence to Montevideo, Buenos Aires, and Rosario from date to April 30, 1913, inclusive, at the following rates of freight, viz: Montevideo, 25 cents per cubic foot; Buenos Aires, 27½ cents per cubic foot; Rosario, 31½ cents per cubic foot.

All freight is to be prepaid and all shipments subject to terms and conditions of the regular carrying line's River Plata bill of lading.

We agree that in case the Prince Line reduce the rates of freight to any other shipper or shippers on clocks you are to receive the benefit of such reduced rates during the period of such reduction.

Yours, faithfully,

PAUL F. GERHARD & CO.,
Per H. CONNOR,
General Agents.

Accepted:

THE ANSONIA CLOCK CO.
RAYMOND J. SCHWEIZER.

Memorandum of freight contract made this 28th day of May, 1912, between Paul F. Gerhard & Co.,

agents of Prince Line, party of the first part, and Messrs. Heywood Bros. & Wakefield Co., party of the second part, for their entire shipments of lawful merchandise, which they control, from New York to Montevideo, Buenos Aires, and Rosario from date to April 30, 1913, inclusive, for which the party of the first part agrees to provide tonnage, provided reasonable notice is given.

Rates of freight as follows:

Cane and wood seat and folding chairs, children's vehicles, bentwood chairs, rattan mats, chair cane, car seats, woven cane web seating, reed and rattan specialities, Montevideo, 17½ cents; Buenos Aires, 17½ cents; Rosario, 21½ cents.

All per cubic foot; all freight prepaid; all shipments subject to the carrying line's regular bill of lading.

Other articles to be charged at current tariff rates.

It is further agreed that in case the Prince Line reduces the rates of freight to any other shipper or shippers on any articles named in this contract the party of the second part shall have the benefit of such reduced rates during the period of such reduction.

PAUL F. GERHARD & CO.,

Agents of Prince Line.

HEYWOOD BROTHERS & WAKEFIELD CO.,

HENRY H. MORRELL.

Memorandum of freight contract made this 10th day of May 1912, between Paul F. Gerhard & Co., agents of the Prince Line, party of the first part, and Messrs. William H. Knox & Co., party of the second part, for their entire shipments of lawful merchandise (approximately 50,000 tons) from

New York to Mo[illegible]ideo, La Plata, Buenos Aires, and Rosario from May 24, 1912, to April 30, 1913, inclusive, for which the party of the first part agrees to provide tonnage, provided reasonable notice (say, 20 days for lots under 500 tons and 30 days for larger lots) is given.

Rates of freight as follows:

	Cents
Class 1. Agricultural machinery, say, harvesters, headers, binders, header binders, reapers, mowers, hayrakes, drills, stackers, seed sowers, corn pickers, hand grain shellers and parts thereof, carts, harrows, plows (except traction engine gang plows)	16
Class 2. Cleaners, hay presses, grain mills, land rollers, pulverizers, grain planters	18
Class 3. Lubricating oil	15
Class 4. Windmill material	19
Class 5. Agricultural engines and thrashers (over 3 tons and not exceeding 24,000 pounds)	22
Agricultural engines and thrashers (up to 3 tons)	20
[252] Class 6. Binder twine, per bale	28
Class 7. Wheelbarrows, shovels, spades, hayforks	20
Class 8. Chairs, desks, common furniture	17½
Special, Machinery, including gas engines (up to 2 tons)	20
Automobiles (until Dec. 31, 1912):	
Not exceeding 2 tons	15
Over 2 tons	18

General cargo and hardware and cargo not otherwise enumerated at current rates.

All the above rates are to Montevideo and Buenos Aires.

Rates to Rosario shall be 4 cents per cubic foot, or 56 pounds, over the Buenos Aires rates, whether steamer goes direct or otherwise.

Rates to La Plata shall be 3 cents per cubic foot, or 56 pounds, over the Buenos Aires rate.

Binder twine to Rosario shall pay a freight of 6 cents per bale over the Buenos Aires rate.

The rate on binder twine to La Plata shall be 6 cents per bale over the Buenos Aires rate.

All cargo, unless otherwise specified, to pay freight at ——— per cubic foot, or 56 pounds, at steamer's

option, and no piece or package is to exceed 2 tons in weight except thrashers.

Parts of any of the above-mentioned articles to take the rate of the complete machine.

Rates on goods weighing over 4,480 pounds per package, are to be mutually agreed between the parties hereto.

It is understood that this contract does not cover shipments of lumber, kerosene, inflammables, rosin, and other rough or dangerous cargo, which are subject to special arrangement.

All freight is to be prepaid, and all shipments subject to terms and conditions of the regular carrying line's River Plata bill of lading.

It is further agreed that in case the Prince Line reduce the rates of freight to any other shipper or shippers on any articles named in this contract, the party of the second part shall have the benefit of such reduced rates during the period of such reduction.

PAUL F. GERHARD & Co.,
Agents Prince Line.
WILLIAM H. KNOX & Co.

Memorandum of freight contract, made this 1st day of May 1912, between Paul F. Gerhard & Co., agents of Prince Line, party of the first part, and Hughes & Co., party of the second part, for their entire shipments of lawful merchandise (approximately 1,500 tons) from New York to Montevideo, Buenos Aires, and Rosario, from May 1, 1912, to April 30, 1913, inclusive, for which the party of the first part agrees to provide tonnage, provided reasonable notice (say 20 days) is given.

Rates of freight as follows:

	Cents per cubic foot
Class 1. Agricultural machinery, say, harvesters, headers, binders, header binders, reapers, mowers, hay rakes, drills, stackers, seed sowers, corn pickers, hand grain shellers, and parts thereof, carts, harrows, plows (except traction-engine gang plows)	16
Class 2. Cleaners, hay presses, grain mills, land rollers, pulverizers, grain planters	18
Class 3. Lubricating oil	15
Class 4. Windmill material	19
Class 5. Agricultural engines and threshers (over 3 tons, and not exceeding 20,000 pounds)	22
Agricultural engines and threshers (up to 3 tons)	20
Class 6. Binder twine, per bale	28
Class 7. Wheelbarrows, shovels, spades, hayforks, chairs, desks, common furniture	20
Special. Machinery (including gas engines) (up to 2 tons)	20
Automobiles (until Dec. 31, 1912):	
Not exceeding 2 tons	15
Over 2 tons	18

[253] General cargo and hardware and cargo not otherwise enumerated, at current rates.

All the above rates are to Montevideo and Buenos Aires.

Rates to Rosario shall be 4 cents per cubic foot over the Buenos Aires rates, whether steamer goes direct or otherwise.

Binder twine to Rosario shall pay a freight of 6 cents per bale over the Buenos Aires rate.

All cargo, unless otherwise specified, to pay freight at per cubic foot, or 56 pounds, at steamer's option, and no piece or package is to exceed 2 tons in weight (except threshers).

Rates on goods weighing over 4,480 pounds per package, are to be mutually agreed between the parties hereto.

It is understood that this contract does not cover shipments of lumber, kerosene, rosin, and other rough cargo, which are subject to special arrangement.

All freight is to be prepaid, and all shipments subject to terms and conditions of the regular line's River Plata bill of lading.

PAUL F. GERHARD & Co.,
Per H. CONNOR,
Agents of Prince Line.
HUGHES & Co.

NEW YORK, *May 1, 1912.*

MR. J. R. MELCHER,
New York.

DEAR SIR: We beg to confirm contract made with you today for shipment of 24,000 wine barrel shooks, hence to Buenos Aires, at the rate of 16 cents net per cubic foot, prepaid as customary.

Shipments during the balance of the present year, in about equal monthly quantities, and as arranged to mutual convenience.

All shipments subject to conditions of the Prince Line's regular River Plata bill of lading.

Yours, faithfully,

PAUL F. GERHARD & Co.,
p. H. CONNOR,
General Agents.

Accepted with the understanding that quantity may be 21,000 only, my option, to be declared by May 9, 1912.

J. R. MELCHER.

April 30, 1912

MESSRS. JOHN DUNN, SON & Co., Present.

DEAR SIRS: In consideration of your continued patronage, we hereby agreed to accept your shipments, say to April 30, 1913, on the following terms:

Contract rates on all contract goods. Tariff rates on the balance of shipments.

It is understood that you are to receive as favorable rates, terms, and conditions as any other shipper.

It is understood the volume of shipments by our line is estimated on the basis of year ending April 30, 1912. Any increase over 10 percent to be subject to mutual agreement.

Upon receipt of your letter accepting and ratifying the conditions named above, this is to be considered a contract.

Yours, truly,

PAUL F. GERHARD & CO.,
Agents Prince Line.

NEW YORK, *May 1, 1912.*

MESSRS. PAUL F. GERHARD & CO.,
8 Bridge Street, New York.

DEAR SIRS: Your favor of April 30 received, protecting our shipments by the Prince Line to April 30, 1913, and in reply beg to state that we accept the conditions named therein.

Yours, truly,

JOHN DUNN, SON & CO.

NEW YORK, *April 30, 1912.*

FISKE BROS. REFINING CO.,
New York.

DEAR SIRS: We beg to confirm contract made today with your goodselves for shipment of about 6,000 barrels lubricating oil, hence to Buenos Aires and [254] Rosario, at the following rates, viz: Buenos Aires, 15 cents net per cubic foot; Rosario, 19 cents net per cubic foot.

Shipment from date to April 30, 1913, inclusive, in about equal monthly quantities as arranged to mutual convenience.

All shipments subject to conditions of the Prince Line's regular River Plata bill of lading.

Yours, faithfully,

PAUL F. GERHARD & Co.,
P. H. CONNOR,
General Agents.

HC/NJM.
Accepted:

FISKE BROTHERS REFINING CO.,
H. F. FISKE,
President.

Witness:
G. P. Fiske,
F. J. Snyder.

Memorandum of freight contract, made this 22d day of April 1912 between Paul F. Gerhard & Co., agents of Prince Line, party of the first part, and the Gerhard & Hay Co., as agents for the Emerson-Brantingham Co., Rockford, Ill., party of the second part.

Party of the first part agrees to provide transportation for all shipments of plows (riding), planters, harrows, mowers, and rakes which the party of the second part may have to ship to Montevideo, Buenos Aires, and Rosario, to April 30, 1913, inclusive, estimated at 400 to 600 tons, at the following rates of freight:

* * * * *

It is also mutually agreed and understood that this contract covers the entire shipments of Emerson-Brantingham Co., of Rockford, Ill., for shipments to

River Plata ports, and shipments shall only be made from New York by steamers designated by party of the first part.

It is also mutually agreed and understood that if lower rates prevail during the above-mentioned period the party of the first part shall protect the party of the second part, either by meeting the rates or permitting party of the second part to engage room and ship by other steamship lines, each and every shipment to be submitted to party of the first part for their instructions before action is taken.

In connection with the foregoing it is agreed as follows:

Emerson-Brantingham Co. are to be protected by steamship lines at the lowest rates accepted under any contract for the same class of implements to the ports named in this contract.

This contract is to cover all business controlled (as to routing) by Emerson-Brantingham Co., and they agree in good faith everything possible under this arrangement.

In any event that any consignees make steamship arrangements contrary to this contract and the Emerson-Brantingham Co. can not induce them to permit shipment under this contract, they have privilege of shipping by such steamer or steamers as consignees may instruct.

The steamship lines to be used under this contract are as follows: Prince Line, Houston Line, American & Rio Plata Line, Barber Line, and Norton Line.

PAUL F. GERHARD & Co.,

Agents.

EMERSON-BRANTINGHAM Co.,
J. D. WHITE,

Salesman.

Accepted April 26, 1912.

[255] Memorandum of freight contract, made this 22d day of April, 1912, between Paul F. Gerhard & Co., agents of Prince Line, party of the first part, and J. H. Snyder, party of the second part, for his entire shipments of lawful merchandise (approximately 500 tons) from New York to Montevideo, Buenos Aires, and Rosario, from May 1, 1912, to April 30, 1913, inclusive, for which the party of the first part agrees to provide tonnage, provided reasonable notice (say 20 days) is given.

Dates of freight as follows:

	Cents per cubic foot
Class 1. Agricultural machinery, say harvesters, headers, binders, header binders, reapers, mowers, hay rakes, drills, stackers, seed sowers, corn pickers, hand grain shellers and parts thereof, carts, harrows, plows (except traction engine gang plows)	16
Class 2. Cleaners, hay presses, grain mills, land rollers, pulverizers, and grain planters	18
Class 3. Lubricating oil	15
Class 4. Windmill materia	19
Class 5. Agricultural engines and threshers (over 3 tons and not exceeding 20,000 pounds)	22
Agricultural engines and threshers (up to 3 tons)	20
Class 6. Binder twine, per bale	28
Class 7. Wheelbarrows, shovels, spades, hayforks, chairs, desks, and common furniture	20
Special:	
Machinery (including gas engines) up to 2 tons	20
Automobiles (until Dec. 31, 1912)—	
Not exceeding 2 tons	15
Over 2 tons	18
General cargo and hardware and cargo not otherwise enumerated, at current rates.	

All the above rates are to Montevideo and Buenos Aires.

Rates to Rosario shall be 4 cents per cubic foot over the Buenos Aires rates, whether steamer goes direct or otherwise.

Binder twine to Rosario shall pay a freight of 6 cents per bale over the Buenos Aires rate.

All cargo, unless otherwise specified, to pay freight at per cubic foot or 56 pounds, at steamer's option,

and no piece or package is to exceed 2 tons in weight (except threshers).

Rates on goods weighing over 4,480 pounds per package are to be mutually agreed between the parties hereto.

It is understood that this contract does not cover shipments of lumber, kerosene, rosin, and other rough cargo, which are subject to special arrangement.

All freight is to be prepaid and all shipments subject to terms and conditions of the regular lines River Plata bill of lading.

PAUL F. GERHARD & Co.,
Agents of Prince Line.
J. H. SNYDER.

DECEMBER 11, 1911.

MR. ROBERT E. LEBER,
New York City

DEAR SIR: We beg to confirm contract made this day with you for all your shipments of lawful merchandise from New York to Montevideo, Buenos Aires, and Rosario, from date until December 31, 1912, inclusive, at the following rates of freight, viz:

* * * * * *

All the above prepaid as customary. Shipments to go forward by steamers of the Prince Line or other steamers as designated by us.

[256] This contract is written in duplicate, one of which kindly accept and return to us, and oblige.

Yours, faithfully,

PAUL F. GERHARD & Co.,
P. H. CONNOR,
General Agents.

Accepted:

ROBERT E. LEBER.

Memorandum of freight contract, made this 11th day of December, 1911, between Paul F. Gerhard & Co., agents for the Prince Line, parties of the first part, and the Cadillac Motor Car Co., Detroit, Mich., parties of the second part, for their entire shipments of automobiles (boxed) from New York to Montevideo, Buenos Aires, and Rosario, from date to December 31, 1912, inclusive, at the following rates of freight, viz:

To Montevideo and Buenos Aires, 15 cents net per cubic foot; to Rosario, 19 cents net per cubic foot.

All prepaid as customary; no package to exceed 2 tons in weight.

The following declaration to be given by the Cadillac Motor Car Co. with each shipment of automobiles, viz:

> We hereby certify that the gross weight of _____ marked _____ that we wish to ship by steamer _____ to sail _____ is _____ pounds, and that the dimensions are as follows: _____ _____. Also that no gasoline, prestolite, carbide, water, cotton waste, india rubber, solution, spirit varnish, petrol, or any other article of a dangerous character remains in the tanks or other receptacles, and that the tanks, etc., have been blown out by fresh air.

Shipments to go forward by steamers of the Prince Line, and/or other steamers, as may be designated by us.

All shipments subject to terms and conditions of the regular Prince Line bill of lading.

PAUL F. GERHARD & CO.,
Agents.

Accepted for Cadillac Motor Car Co.

GERHARD & HEY,
Per J. W. WALTER.

Memorandum of freight contract, made this 8th day of December, 1911, between Paul F. Gerhard & Co., agents of the Prince Line, parties of the first part, and Messrs. A. S. Lascelles & Co., parties of the second part, for their entire shipments of lawful merchandise from New York to Montevideo, Buenos Aires, and Rosario, from date to December 31, 1912, inclusive.

Parties of the first part agree to provide tonnage for the above lawful merchandise; parties of the second part to give reasonable notice of intended shipments (say, 20 days), said goods to go forward at the lowest rate of freight for like articles on the steamer carrying the goods.

Lumber, rosin, kerosene, and other rough cargo are not covered by this agreement, and to be subject to special arrangement.

All freight to be prepaid as customary.

It is also agreed that the parties of the second part are at liberty to ship by any other line such goods as are specifically ordered by consignee to be shipped by any particular line.

PAUL F. GERHARD & Co.,
General Agents, Prince Line.
Per H. CONNOR,
A. S. LASCELLES & Co.,
South American Department.
Per OTTO GELOCHER,
Manager.

NEW YORK, *December 9, 1911.*

Mr. J. R. MELCHER,
New York City.

DEAR SIR: We beg to confirm engagement made with you today of 72,000 wine barrel shooks, hence to

Buenos Aires, at the rate of 11 cents net per cubic foot, prepaid; for shipment in about equal monthly quantities of 9,000 barrels each, commencing February 1912, as arranged to mutual convenience.

[257] Shipments to go forward by steamers of the Prince Line and/or other steamers, as designated by us.

We are writing this letter in duplicate, and would thank you to accept one and return to us, and oblige.

Yours faithfully,

PAUL F. GERHARD & CO.,
PER H. CONNOR,
General Agents.

Accepted.

J. R. MELCHER.

DECEMBER 9, 1911.

DECEMBER 9, 1911.

BROOKLYN COOPERAGE CO.,
New York City.

GENTLEMEN: We beg to confirm engagement made with you today of 15,000 wine barrel shooks, hence to Buenos Aires, at the rate of 11 cents net per cubic foot, prepaid as customary; for shipment in about equal monthly quantities of 3,000 barrels each, commencing February, 1912, as arranged to mutual convenience.

Shipments to go forward by steamers of the Prince Line, and/or other steamers, as designated by us.

We are writing this letter in duplicate, and would thank you to accept one and return to us, and oblige.

Yours, faithfully,

PAUL F. GERHARD & CO.,
PER H. CONNOR,
General Agents.

Accepted.

BROOKLYN COOPERAGE CO.

Memorandum of freight contract, made this 6th day of December, 1911, between Paul F. Gerhard & Co., agents for the Prince Line, parties of the first part, and J. Wassermann & Co., parties of the second part, for 50,000 wine barrel shocks [sic], at the rate of 11 cents net per cubic foot, prepaid as customary; hence to Buenos Aires; shipment during second six months of 1912, in quantities as arranged to mutual convenience.

All shipments subject to terms and conditions of the regular Prince Line bill of lading.

PAUL F. GERHARD & CO.,
Per H. CONNOR,
General Agents, Prince Line.

Accepted.

J. WASSERMAN & CO.

Memorandum of freight contract, made this 1st day of December, 1911, between Paul F. Gerhard & Co., agents for the Prince Line, parties of the first part, and Messrs. Ault & Wiborg Co., parties of the second part, for their entire shipments of printing ink from New York to Montevideo, Buenos Aires, and Rosario, from January 2, 1912, to December 31, 1912, inclusive, at the following rates of freight, viz:

To Montevideo and Buenos Aires, 19 cents net, per cubic foot; to Rosario, 23 cents net, per cubic foot. All prepaid as customary.

Shipments to go forward by steamers of the Prince Line, and/or other steamers as may be designated by us.

All shipments subject to terms and conditions of the regular Prince Line bill of lading.

PAUL F. GERHARD & Co.,
Agents.

Accepted.

THE AULT & WIBORG CO.,
L. A. AULT,
President.

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[258] Memorandum of freight contract made this 3d day of November, 1911, between Paul F. Gerhard & Co., agents for the Prince Line, party of the first part, and the Gulf Cooperage Co., of Pittsburgh, Pa., party of the second part, for shipment of 150,000 (10 per cent more or less) wine barrel shooks, from New York to Buenos Aires, at the rate of 11 cents net per cubic foot, prepaid as customary.

Shipments to go forward in about equal monthly quantities during the year of 1912, as arranged to mutual convenience.

Prince Line agrees to furnish not less than one steamer per month.

All shipments subject to terms and conditions of regular Prince Line bill of lading.

PAUL F. GERHARD & Co.,
Per H. CONNOR,
General Agents, Prince Line.

Accepted.

GULF COOPERAGE CO.

Memorandum of freight contract, made this 20th day of September, 1911, between Paul F. Gerhard & Co., agents for the Prince Line, party of the first part, and Brown Portable Elevator

Co., party of the second part, for their entire shipments of portable elevators from New York to Montevideo, Buenos Aires, and Rosario from date to May 1, 1912, inclusive, at the following rates of freight, viz:

To Montevideo and Buenos Aires, $8 per ton; to Rosario, $9.60 per ton.

All the above per ton of 40 cubic feet, or 2,240 pounds, steamer's option, prepaid as customary, and no package to exceed 2 tons in weight.

The Prince Line agree to furnish not less than one steamer per month; all shipments subject to terms and conditions of the regular Prince Line bill of lading.

PAUL F. GERHARD & Co.,
Per H. CONNOR,
General Agents, Prince Line.

Accepted.

THE BROWN PORTABLE ELEVATOR CO.

Memorandum of freight contract, made this 1st day of September, 1911, between Paul F. Gerhard & Co., agents for the Prince Line, parties of the first part, and Studebaker Corporation (E. M. F. factories), Detroit, Mich., parties of the second part for their entire shipments of automobiles (boxed) from New York to Montevideo, Buenos Aires, and Rosario from date to December 31, 1912, inclusive, at the following rates of freight, viz:

To Montevideo and Buenos Aires, 15 cents net per cubic foot.

To Rosario, 19 cents net per cubic foot.

All prepaid as customary; no package to exceed 3 tons in weight.

The following declaration to be given by the Studebaker Corporation with each shipment of automobiles, viz:

> We hereby certify that the gross weight of automobile marked ——— that we wish to ship by steamer ——— to sail ——— is ——— pounds, and that the dimensions are as follows ———; also that no gasoline, prestolite, carbide, or water remains in the tanks, and that the tanks have been blown out by fresh air.

The Prince Line agree to furnish not less than one steamer per month.

All shipments subject to terms and conditions of the regular Prince Line bill of lading.

PAUL F. GERHARD & CO.,
Per H. CONNOR,
General Agents Prince Line.

Accepted:

STUDEBAKER CORPORATION,
G. M. SHERMAN,
General Traffic Manager.

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[259] Memorandum for freight contract, made this 21st day of August, 1911, between Paul F. Gerhard & Co., agents for the Prince Line, party of the first part, and Mr. Ed. Maurer, party of the second part, for his entire shipments from New York to Montevideo, Buenos Aires, and Rosario from date to April 30, 1912, inclusive, viz:

* * * * *

All the above per cubic foot or 56 pounds, steamer's option, prepaid as customary, and no piece to exceed 2 tons in weight, except where specified.

All shipments subject to terms and conditions of the regular line bill of lading.

PAUL F. GERHARD & Co.,
Per H. CONNOR,
General Agents Prince Line.

Accepted.

Per pro ED. MAURER.
CHAS H. FICTOR.

Memorandum of freight contract, made this 31st day of July, 1911, between Paul F. Gerhard & Co., agents for the Prince Line, parties of the first part, and J. Wassermann & Co., parties of the second part, for 35,000/40,000 wine barrel shooks, at the rate of 10 cents net per cubic foot, prepaid as customary; hence to Buenos Aires, from date to June 30, 1912, inclusive.

Shipments to be made in quantities as arranged to mutual convenience.

All shipments subject to terms and conditions of the regular Prince Line bill of lading.

PAUL F. GERHARD & Co.,
Per H. CONNOR,
General Agents Prince Line.

Accepted.

J. WASSERMAN & Co.

1¼ percent brokerage to James A. Nichols.

Memorandum of freight contract, made this 29th day of July, 1911, between Paul F. Gerhard & Co., agents for the Prince Line, parties of the first part, and J. Wassermann & Co., parties of the second part, for 2,000 wine barrel shooks, at the

rate of 10 cents net per cubic foot, prepaid as customary; hence to Buenos Aires; shipment as follows: 1,000 November, 1911; 1,000 February, 1912.

All shipments subject to terms and conditions of the regular Prince Line bill of lading.

PAUL F. GERHARD & CO.,
Per H. CONNOR,
General Agents Prince Line.

Accepted.

J. WASSERMANN & CO.,
PHIL SEGALLER.

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[260] Memorandum of freight contract, made this 27th day of July, 1911, between Paul F. Gerhard & Co., agents for the Prince Line, parties of the first part, and J. Wassermann & Co., parties of the second part, for 13,200 wine barrel shooks, at the rate of 10 cents per cubic foot, prepaid as customary; hence to Buenos Aires; shipment during the following months of 1911 and 1912 in quantities as follows: August, 2,800; September, 800; October, 2,800; November, 800; December, 2,000; February, 2,000; March, 2,000.

All shipments subject to terms and conditions of the regular Prince Line bill lading.

PAUL F. GERHARD & CO.,
Per H. CONNOR,
General Agents, Prince Line.

Accepted.

Memorandum of freight contract, made this 24th day of July, 1911, between Paul F. Gerhard & Co., agents for the Prince Line, parties of the first part, and

Messrs. Adriance, Platt & Co., parties of the second part, for all shipments controlled by them of harvesters and binders, mowers, rakes, and parts, from New York to Montevideo, Buenos Aires, and Rosario, from date to April 30, 1912, inclusive at the following rates of freight, viz:

To Montevideo and Buenos Aires 10 cents net per cubic foot, or $4 net per ton.

To Rosario 13 cents net per cubic foot, or $5.20 net per ton.

All the above per ton of 40 cubic feet, or 2,240 pounds, steamer's option, prepaid as customary.

All shipments subject to terms and conditions of the regular Prince Line bill of lading.

PAUL F. GERHARD & Co.,
General Agents Prince Line.

Accepted.

ADRIANCE, PLATT & Co.

JULY 11, 1911.

Messrs. OELRICHS & Co.,
New York City.

DEAR SIRS: We are in receipt of your esteemed favor of the 10th instant and beg to confirm agreement made with you, which is to cover all your shipments of leather to Buenos Aires, account of Messrs. Tomas & Co., the clause, as stated in your letter, to be initialed by you.

We reserve the privilege of naming steamers of the Prince Line or other lines to carry the goods.

In accordance with your telephonic communication we have booked about 2,500 cubic feet leather to go

forward under this contract per steamship *Chinese Prince.*

Yours, faithfully,

PAUL F. GERHARD & CO.,
General Agents.

Accepted.

OELRICHS & Co.

JULY 11, 1911.

MESSRS. OELRICHS & Co.,
Forwarding Department, New York City.

DEAR SIRS: Referring to our respects of even date, we omitted to repeat in writing the verbal understanding with you that, although the leather is of much greater value than $100 per package, you agree to limit the value of your shipments to this figure in consideration of the reduced rate of freight at which we have agreed to carry the same, and any claims that may occur are to be limited in settlement to this figure.

Yours, faithfully,

PAUL F. GERHARD & CO.,
General Agents.

NEW YORK, *July 10, 1911.*

MESSRS. PAUL F. GERHARD & Co.,
10 Bridge Street, City.

GENTLEMEN: We be leave to confirm the arrangement made with your Mr. Gerhard with reference to the shipping by us by the steamers of the Prince Line, for the account of Tomas & Co., leather in cases to Buenos Aires.

[261] Our instructions from Tomas & Co. are to close this contract with you from date until December 31, 1912, the understanding being that the rate of freight to be charged on such shipment of leather will be 25

cents per cubic foot, without reference to the value, and the clause reading as follows—

> It is agreed that the value of the within merchandise does not exceed $100 per package, and freight rate is fixed on this basis,

to be inserted on the bill of lading.

We would ask you kindly to acknowledge receipt of this letter, advising us if our understanding in this connection is correct and also if you will be prepared to accept our shipments on this basis.

Yours, very truly,

OELRICHS & Co.,
Forwarding Dept.
Per F. HENJES,
Manager.

Memorandum of freight contract, made this 10th day of June, 1911, between Paul F. Gerhard & Co., agents for the Prince Line, parties of the first part, and J. Wassermann & Co., parties of the second part, for 50,000 wine-barrel shooks, at the rate of 10 cents net per cubic foot, prepaid as customary, hence to Buenos Aires; shipment up to and including March, 1912, in quantities as arranged to mutual convenience.

All shipments subject to terms and conditions of the regular Prince Line bill of lading.

PAUL F. GERHARD & Co.,
Per H. CONNOR,
General Agents, Prince Line.

Accepted.

J. WASSERMANN & Co.,
PHIL. SEGALLER.

JUNE 6, 1911.

MR. J. R. MELCHER,
New York City.

DEAR SIR: We beg to confirm engagement made with you today of 18,400 wine-barrel shooks for shipment hence to Buenos Aires, at the rate of 10 cents net per cubic foot, prepaid as customary, to go forward as follows: 1,200 barrels, August; 5,000 barrels, September; 5,000 barrels, January, 1912; 2,400 barrels, February, 1912; 2,400 barrels, March, 1912; 2,400 barrels, April, 1912.

Yours faithfully,

PAUL F. GERHARD & CO.,
Per H. CONNOR,
General Agents.

Accepted.

J. R. MELCHER.

NEW YORK, *January 27, 1911.*

MESSRS. ARKELL & DOUGLAS,
65 Beaver Street, New York City.

DEAR SIRS: We beg to confirm engagement made with you today of 21,000 barrel shooks, hence to Buenos Aires, at the rate of 10 cents net per cubic foot, prepaid as customary, for shipment as follows, viz: 5,000 barrels during February, 4,000 barrels during March, 4,000 barrels during April, 4,000 barrels during May, 4,000 barrels during June,

Shipments to go forward by steamers of the Prince Line, Barber Line, Norton Line, and American and Rio Plata Line, as arranged to mutual convenience.

Yours, faithfully,

PAUL F. GERHARD & Co.,
Per H. CONNOR,
General Agents.

HC/NJM.
Accepted.

ARKELL & DOUGLAS (INC.),
S. R. SCOTT,
Manager South American Department.

NEW YORK, *January 4, 1911.*

[262] Messrs. HEYWOOD BROS. & WAKEFIELD CO.,
129 Charlton Street, New York City.

GENTLEMEN: We beg to confirm working agreement made with you today of all your shipments of cane and wood-seat chairs, reed and rattan furniture, children's carriages and gocarts, bent-wood chairs, rattan mats, chair cane, car seats and woven-cane web seating, folding chairs, and reed and rattan specialties hence to Montevideo, Buenos Aires, and Rosario, from January 1, 1911, to December 31, 1911, at the following rates of freight: Montevideo and Buenos Aires, 12 cents per cubic foot; Rosario, 16 cents per cubic foot.

Freight prepaid.

Shipments to go forward by the steamers of the Prince Line, Messrs. Barber & Co. (Inc.), Messrs. Howard Houlder & Partners, and Messrs. Norton & Son, as may be arranged to mutual convenience.

Shipments, if any, made by the Lamport & Holt Line to be allowed under this agreement, subject to their acceptance at above rates.

We hand you this letter in duplicate. Kindly return one copy duly approved.

Yours, faithfully,

PAUL F. GERHARD & CO.,
General Agents.

Approved January 5, 1911.

HEYWOOD BROS. & WAKEFIELD CO.,
F. H. GREEN.

CG/NJM

NEW YORK, *June 29, 1910.*

Messrs. WM. H. KNOX & Co.,
Produce Exchange, New York City.

DEAR SIRS: We beg to confirm working agreement made with you today on behalf of the Prince Line, Messrs. Barber & Co. (Inc.), Messrs. Norton & Son, and Messrs. Howard Houlder & Partners, for all your shipments of lawful merchandise hence to Montevideo, Buenos Aires, and Rosario to the end of the present year, at the following rates of freight:

	Montevideo or Buenos Aires	*Rosario*
Wheelbarrows, agriculturals, carts, wagons, rakes, forks	[1] $0.10	[1] $0.13
Chairs, desks, shovels, pumps, grindstones, lanterns	[1] .12	[1] .15
Binder twine	[2] .16	[2] .22
Hardware, per ton, weight or measurement	5.50	6.80

[1] Per cubic foot.
[2] Per bale.

Ship reserves right of charging 1 per cent on valuation.

Other articles not specified at current rates.

It is understood that you agree to confine your shipments during the balance of the present year to the above lines.

Lumber, hardwood, and kerosene are not included in this agreement.

We hand you this letter in duplicate. Kindly return one copy, duly approved.

Yours, faithfully,

PAUL F. GERHARD & Co.,
General Agents.

Approved.

WILLIAM H. KNOX & Co.

NEW YORK, *April 5, 1910.*

Messrs. HEYWOOD BROS. & WAKEFIELD Co.,
New York City.

GENTLEMEN: We beg to confirm working agreement made with you today on behalf of the Prince Line, Messrs. Barber & Co., Messrs. Norton & Son, and Messrs. Howard Houlder & Partners for all your shipments of chairs and furniture hence to Montevideo, Buenos Aires, and Rosario to the end of the present [263] year at the following rates of freight: To Montevideo and Buenos Aires, 10 cents per cubic foot; to Rosario, 13 cents per cubic foot.

Freight prepaid.

It is understood that you will confine your shipments during the balance of the year to the above-named lines.

We hand you this letter in duplicate. Kindly return one copy, duly approved.

Very sincerely, yours,

PAUL F. GERHARD & Co.,
General Agents.

Shipments, if any, made by Lamport & Holt Line to be allowed under this arrangement (subject to their acceptance at above rates).

HEYWOOD BROTHERS AND WAKEFIELD Co.,
F. H. GREEN.

[pp. 262–263]

The CHAIRMAN. Are those joint contracts as between the conference lines?

Mr. GERHARD. No; each line makes its own contracts. Where it comes to large bulk and one line does not care to assume the responsibility of the whole contract, why, they will ask other lines to take part in that contract. Then, of course, in such contracts as are authorized those contracts are made for joint accounts, but otherwise really those contracts are made individually for each line. Only, as I state there in my declaration, the shippers have the privilege of shipping by any of those lines by making their own arrangements with the agents.

Mr. HUMPHREY. But they are limited in giving all of their shipping either to your line or to other lines in the conference, are they not?

Mr. GERHARD. Well, the merchants themselves agree to ship all their goods for that contract. They agree to ship all their goods.

Mr. HUMPHREY. They agree to ship all their goods by your line or by some line in the conference?

Mr. GERHARD. Yes. Some years ago, when the lines were all fighting and rates got down to 10 cents or even lower, none of the lines was disposed to dispatch more than one small steamer a month. The result was that at one season in New York Harbor there were any number of lighters loaded up with cargo for the River Plata and no steamers to take it. The merchants were asking, "What is the rate?" "The rate is 10 cents a foot." "Well, give me room for it." "I have not got any room. You have got to wait." See? They were ready to pay almost any price, and that is the reason why they are willing to make their contract ahead and know that they can depend upon facilities to ship.

Mr. STEPHENS. About those contracts, you stated that certain large firms were given contracts.

Mr. GERHARD. Yes.

Mr. STEPHENS. That, after those contracts were closed then the same terms were offered to the small shippers?

Mr. GERHARD. Yes; the identical terms.

* * * * *

[264] Mr. STEPHENS. There is no time for closing contracts—the field is always open?

Mr. GERHARD. Yes; we are always ready to make contracts. The great advantage in establishing a regular service is to have contracts on your books. You cannot depend on cargo when you have a 10,000-ton ship to load. You can not wait until the ship is in berth and then go out and ask for cargo. You have to make your plans ahead to load these big ships. It is impossible to do business without having a lot of cargo booked ahead.

Mr. STEPHENS. If the smaller shipper refused to make a contract, or does not make a contract with you when the terms are offered him, can he get the same rates, or what rate does he get?

Mr. GERHARD. He gets the tariff rate.

Mr. STEPHENS. He can not obtain the smaller rate?

Mr. GERHARD. He can get it on the same terms as the other people are getting it. I have always been in favor of encouraging the small shippers, because I have found those small shippers to build up into big business houses. It is to our advantage to have as many people in the trade as possible.

Mr. STEPHENS. Any time within the current year he can make the contract with you at the same terms as the larger shippers can in their contracts?

Mr. GERHARD. I should be willing to do it; certainly.

* * * * *

Mr. HARDY. Mr. Gerhard, there is one thing in your statement I do not believe I understand. You say each line makes it own contracts, and yet I understand you to say that the rates are the same.

Mr. GERHARD. Oh, yes; the rates.

[265] Mr. HARDY. If you make a contract with a large shipper, and suppose another firm makes another contract with another large shipper, is he governed by the terms of your contract?

Mr. GERHARD. The rates, you know—we agree not to cut rates.

Mr. HARDY. That is what I want to get at. When you make special terms on your own account——

Mr. GERHARD. We then agree amongst ourselves to lower the rates.

Mr. HARDY. That separate contract is in terms agreed on by the conference?

Mr. GERHARD. By the agents.

Mr. HARDY. So that any other line would make the same contract that you do?

Mr. GERHARD. Certainly. * * *

* * * * * *

[267] Mr. GERHARD. I have already explained—you speak of the Harvester Trust. The Harvester Trust does not ship goods itself. They sell goods to the merchants in New York and these are the very men that we trade with. These big concerns that ship from 50,000 to 100,000 tons apiece.

Mr. HUMPHREY. Do any of your lines give preferences——

Mr. GERHARD. I have already stated how we handle it. We drive the best bargain we can, generally, with one house first, you know, and after closing the contract with them then we notify the other shippers

that we have closed on such terms and they generally fall in line and close with us. When we have closed with the large shippers we offer the same terms to every other man who wishes to come in on the same terms. So we make no special rates for the big shippers.

Mr. HUMPHREY. In other words, your lines do not make special agreements?

Mr. GERHARD. No sir; we give it to the small shipper the same way as we do the large shipper.

* * * * *

[269] The CHAIRMAN. Is not this the situation—if some independent lines strongly backed should get into the trade and prove a menace to you, you would just take them in?

Mr. GERHARD. Probably I should try to make an agreement with them; yes. You are right.

The CHAIRMAN. If you did not do that would you not try to hammer him down?

Mr. GERHARD. Certainly, we should fight him just all we could.

* * * * *

[270] TESTIMONY OF WILLIAM E. HALM

The witness was duly sworn by the chairman.

The CHAIRMAN. You may state your name to the stenographer.

Mr. HALM. My name is William E. Halm. I am manager for R. P. Houston & Co.

The CHAIRMAN. What lines do you represent?

Mr. HALM. R. P. Houston & Co., operating a line from New York to South Africa, and one from New York to the River Plate.

* * * * *

[273] Mr. STEPHENS. You stated that the Houston Line is not a member of the conference?

Mr. HALM. Yes, sir.

Mr. STEPHENS. It does, however, participate in the pooling arrangement of the conference?

[274] Mr. HALM. I believe so. I am quite sure such is the case.

Mr. STEPHENS. Has it a partnership in the contracts made by the conference?

Mr. HALM. Yes; to answer that frankly, in the South African trade all contracts are made for the account of all the steamship lines operating, and each carries its proportion of the contract as it may be tendered to them by the shippers from time to time. In the case of a large shipper, such as the Standard Oil Co., they declare the quantity of cargo they have to move in the next 30 or 45 days and you can readily understand that the amount of their cargo is such that no one line could carry it to advantage, either to their satisfaction or that of the Standard Oil Co. When they declare the amount of their cargo, that is allocated to the several steamers that are scheduled.

Mr. STEPHENS. Including your own?

Mr. HALM. Including our own.

* * * * *

[277] The CHAIRMAN. Do you make joint contracts with the shippers in that trade?

Mr. HALM. Yes and no. Mr. Douglas, of Arkell & Douglas, filed with you a copy of the contract he has with the Houston Line. The same contract is made by us with a number of shippers, or at least covering as many of the commodities named in that contract as they may be interested in. I will file a copy of that contract with the names of the shippers with whom we have contracts a little later. That contract reads—it provides that Arkell & Douglas, referring

to that particular contract—that Arkell & Douglas shall give all shipments to the Houston Line, and we, in turn, agree to provide them tonnage for their shipments upon reasonable notice. There is nothing in that contract that implies a liberty to ship by any other lines, but as a matter of fact each contractor is allowed to ship by any of the other lines working in harmony with us.

* * * * *

[278] The CHAIRMAN. State whether or not rebates are granted.

Mr. HALM. Absolutely no.

The CHAIRMAN. How do you treat the small shipper as compared with the large one?

Mr. HALM. They are kept on the same basis. As Mr. Gerhard explained a little while ago, there are certain large firms that export enormous quantities of agricultural implements and that after contracts are closed with them the small shippers are all given an opportunity to contract on the same basis. I may say in reference to our own contract, you will find a certain rate on lubricating oil to my contractors. That rate is the same as was given to the Standard Oil Co.

Mr. AYRES. Is it graded as to the amount of shipments, probably?

Mr. HALM. That does not matter.

Mr. AYRES. It does not matter at all?

Mr. HALM. No, sir; the rate is the same, regardless of the quantity.

Mr. STEPHENS. But the contract rate is a reduced one; it is reduced below the regular tariff?

Mr. HALM. It is materially different from the regular tariff rate.

* * * * *

[286] By the way, I hand you now the contracts that I failed to hand you this morning—the New York Lubricating Oil Co. and the Union Carbide Sales Co. to South Africa—and I hand you a sample of our regular form of contract from New York to the River Plata, together with the names of 19 firms with whom I have contracts, all of whom can have any of these rates they like, even if their contracts do not include all of them. The only reason their contract does not include all is because they are not interested in them.

* * * * *

EXHIBIT NO. 36

* * * * *

[287] Engaged for account of the New York Lubricating Oil Co. with R. P. Houston & Co., as agents for the Donald, Currie & Co., Bucknall Steamship Lines (Ltd.), hitherto working as American & African Steamship Line; Union-Castle Mail Steamship Co. (Ltd.), Cayzer, Irvine & Co., hitherto working as Union Clan Line; Hansa Steam Navigation Co. of Bremen; Houston Line; Prince Line; freight room for all shipments which the New York Lubricating Oil Co. will have for Cape Town, Mossel Bay, Algoa Bay, East London, Port Natal, and Delagoa Bay during the next two years from date at the freight rates and under the conditions enumerated below, namely:

That R. P. Houston & Co., as agents of the lines mentioned, agree on behalf of said lines to furnish at least one steamer per month for all the ports mentioned, except Mossel Bay, during the term of this contract; the quantity of cargo to be shipped to be declared by the New York Lubricating Oil Co. to R. P. Houston & Co. in ample time to allow for proper sup-

ply of tonnage, and all shipments to be made in steamers named by R. P. Houston & Co.

The usual form of line bill of lading to be used; all freight to be prepaid; all goods to be delivered alongside the steamers at the loading berths at the port of New York, free of expense to the steamers.

* * * * * *

[288] Should the lines mentioned make a contract during the period of this contract for the transportation of similar articles to those mentioned in this contract at rates lower than those mentioned above, the New York Lubricating Oil Co. shall be given the benefit of such reductions on the same goods by the said steamer or steamers that carry the goods at the reduced rates.

This contract is to remain in force for a period of two years from date and to continue thereafter indefinitely, subject, however, to termination at the end of two years or at any time thereafter by a nine months' notice in writing by either party to this contract.

New York, April 22, 1909.

Accepted.

R. P. HOUSTON & Co.,
PER WM. E. HALM,
As Agents.

Witness:
R. A. NICOL,
WILLIAM B. SHEDDAN.

Accepted.

NEW YORK LUBRICATING OIL CO.,
Per H. J. HALL, JR.,
Assistant General Manager.

* * * * * *

EXHIBIT 37

Memorandum of freight contract made this 15th day of November, 1912, between Messrs. R. P. Houston & Co., as agents, and the Union Carbide Sales Co. for all the shipments controlled by them of carbide of calcium during the year 1913 to Cape Town, Mossel Bay, Algoa Bay, East London, Port Natal, Delagoa Bay, and Biera, at the following rates of freight:

* * * * *

All shipments to be made from New York by steamers of the undernamed companies: Union-Castle Mail Steamship Co. (Ltd.), Bucknall Steamship Lines (Ltd.), hitherto working as American & African Line; Union-Castle Mail Steamship Co. (Ltd.), Cayzer, Irvine & Co., hitherto working as Union Clan Line; Hansa Steam Navigation Co. of Bremen; Houston Line; Prince Line.

It is also mutually agreed and understood that this contract covers the entire shipments controlled by the Union Carbide Sales Co. for shipment to South and East African ports and outports, and that on shipments to outports, or ports not named in this contract, the usual advance over the rates to ports named in this contract is to be charged.

R. P. HOUSTON & Co.,
Per WM. E. HALM.
UNION CARBIDE SALES CO.,
By J. R. CRAWFORD,
Assistant Secretary.

NEW YORK CITY, *November 15, 1912.*

* * * * *

[289]

EXHIBIT 38

Memorandum of freight contract made this _____ day of _____, 1912, between R. P. Houston & Co., party of the first part, and Messrs. _____ _____, party of the second part, for their entire shipments from New York to Montevideo, La Plata, Buenos Aires, Rosario, and Bahia Blanca from date to April 30, 1913, included.—

Party of the first part agrees to provide tonnage for all shipments which party of the second part has for shipment, provided reasonable notice of intention to ship (say 20 days) is given, at the following rates of freight:

* * * * * *

It is mutually agreed and understood that this contract covers the entire shipments of Messrs. _____, estimated to amount to about _____ tons, from New York to the River Plata ports, and shipments shall only be made by steamers designated by R. P. Houston & Co.

It is further agreed that in case R. P. Houston & Co. reduce the rates of freight to any other shipper or shippers on any of the articles above mentioned during the period covered by this contract, then Messrs. _____ are to be accorded the benefit of all such reductions during the period that said rates are reduced.

[290]

EXHIBIT 39

River Plate contractors

American Trading Co.
Arkell & Douglas.
Chipman (Ltd.).
Donnell & Palmer.
Dufourcq & Co.
Graham, S. M.
Haebler & Co.
Hagemeyer Trading Co.
Markt & Schaefer Co.
Marquardt & Co., H.

Marsily & Co., F. A.
Peabody & Co., H. W.
Peck & Co., Wm. E.
Ramsperger & Co., H. G.
Rose & Co., L. P.
United Shoe Machinery Co.
Staudt & Co.
Swift & Co.
Williams & Co., J. D.

* * * * * *

[302] TESTIMONY OF MR. PAUL GOTTHEIL, REPRESENTING FUNCH, EDYE & CO., OF NEW YORK

* * * * * *

[341] Mr. GOTTHEIL. Yes, sir. I would like to make a statement here, Mr. Chairman. Of course, the contract with the Standard Oil Co. is a contract that provides for a certain quantity of case oil. Now, that is purely and absolutely competitive business, with the open tramp tonnage. Of course, if your committee rules that I must submit that with rates I will, of course, cheerfully obey; but I do not think that I should be asked in this particular instance to let the whole world know, for instance, that our rate to Java is 30 cents, or our rate to Java is 10 cents. I am trying to work up a regular trade and I do not think the rate would help you here, but I will give the committee any information it desires.

The CHAIRMAN. We will take that up with you later and determine definitely about it.

Mr. HARDY. Would you give any other shipper the same rates under the same kind of contract?

Mr. GOTTHEIL. There is no other shipper of case oil.

Mr. HARDY. But suppose there should be. I had in mind a company that might possibly enter into competition. Take the Texas Co. They produce a great deal of oil.

Mr. GOTTHEIL. If they gave the same quantities; yes.

[342] Mr. HARDY. In other words, you would give

the same contract to them that the other people have.

Mr. GOTTHEIL. Yes; if they gave the same quantity they could get it on the same basis.

* * * * * *

[368] Mr. GOTTHEIL. I should like just a minute. It will not take me more than a minute. I have here before me, gentlemen, the "Report of the Royal Commission on Shipping Rings," which was presented to both Houses of Parliament in connection with a question similar to that which is now being investigated by this committee.

* * * * * *

[369] The CHAIRMAN. I will say to you this: That months ago we went through that. We have it.

Mr. GOTTHEIL. If you will pardon me, I will say it expresses so thoroughly my views on the question of the conference and on the question of the rebate system that I should like very much to have pages 38 to 50 embodied in the record as part of my testimony before your committee.

The CHAIRMAN. Is there any objection?

Mr. HARDY. I have no objection. That is the substance of their findings in favor of conferences, is it not?

Mr. GOTTHEIL. Yes.

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PART IV

ADVANTAGES ATTRIBUTED TO THE SHIPPING CONFERENCE AND DEFERRED-REBATE SYSTEM

111. It has been generally recognized by economists and writers on trade organization that the various forms of transport or locomotion should be classed among the trades where monopoly may secure very great advantages. Whether the service of carriage

by sea is one in which the disadvantages of monopoly are outweighed by its advantages is the main question in issue in this inquiry. Monopolies or combinations are, so far as production is concerned, beneficial in proportion as they bring about the substitution of something which is more for something which is less valuable, or enable more of a particular thing or service to be produced or provided at a decreased cost. It will therefore be material to consider how far the system of shipping conferences and deferred rebates conforms to these tests.

112. The chief advantages claimed by its advocates for the system may be classified as follows:

(1) Improvements in service by—

(a) The institution and maintenance of regular sailings and stable rates of freight.

(b) The provision of steamers of high class and speed.

(2) Economy in cost of service.

(3) More economic distribution of cost of service.

(4) The maintenance of equal rates from the United Kingdom and the Continent.

(5) Uniform rates of freight to all shippers, large or small.

(6) No carriage on ship's account.

We shall accordingly in this part of our report consider in what sense these are real advantages, to what extent they are guaranteed by, and how far they are dependent upon, the system of shipping conferences and deferred rebates.

* * * * *

[378]

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* * * * *

158. Assuming then that shipping conferences are necessary to the provision of the advantages above dis-

cussed, there remains the important question [379] whether shipping conferences can effectively exist without some tie upon the shipper either in the form of the system of deferred rebates, or in some other form.

159. We shall in Part V of this report show that the power which combinations of shipping companies are enabled to obtain by means of the system of deferred rebates is abused. If, therefore, the advantages, enumerated above, which are derived from the operations of shipping conferences at the present day are in no sense or only in an inconsiderable degree dependent upon the system of deferred rebates, it is clear that the main arguments in support of that system fall to the ground. If, on the other hand, these advantages are inseparable from the existence of an effective rebate system, the question still remains whether these advantages outweigh the disadvantages which may arise from the abuse of the system. The latter question may, however, be more properly considered in a later part of the report, when we have dealt with the complaints which have been made against the system.

160. The witnesses who have given evidence on behalf of the shipping conferences claim that without some guarantee of the custom of the shippers they would be unable to undertake to dispatch vessels at fixed dates without waiting until their holds were full, or to abstain from shipping cargo on their own account, and from entering into contracts with the more powerful shippers for preferential rates, or to maintain rates of freight at an equal level over long periods, or so to adjust their charges as to encourage trade. They assert that it is necessary that they should have some tie upon the shipper, some guarantee of his custom; and, omitting for the moment the question whether the deferred rebate is the most satis-

factory form of tie, let us consider how far this assertion is warranted.

161. Strong support for the contention of the shipowners is, we think, to be found in certain conditions of the shipping trade which are peculiar to that trade. In the first place, a ship is not like a railway train. In the case of the latter the number of coaches or trucks can be diminished or increased to suit the momentary exigencies of traffic. But a ship is a fixed unit, and in the present day, a fixed unit with a large and increasing cargo capacity. And this increase in the size of vessels, which, owing to the economies in cost to which it leads, is desirable in itself, would not, we think, be effected in the case of the liner unless there were some guarantee that the increased space would be filled.

162. In the second place, unrestricted competition in the shipping trade differs in certain important respects from unrestricted competition in other forms of industry. Competition on the part of a manufacturer usually involves the outlay of considerable capital, and the construction of premises and works implies an intention of establishing a fresh and permanent source of production. The capital of a manufacturer, that is to say, is to some extent fixed and immovable. A ship, on the other hand, or indeed, though in a considerably less degree, a line of ships, is the most mobile form which invested capital can take. Little, if any, outlay is involved in taking ships off one route and placing them on another; nor is there under a system of open competition any obligation to continue running them on a particular route when trade on that route is depressed and rates rule low. In other words, the competition thus introduced offers a means of transport quite different from the service offered by the regular lines into whose trade it has cut, and one which

costs it less than their regular service costs the conference lines. Yet in the case of any particular sailing the difference is immaterial, so far, at least, as many shippers are concerned. Shippers would, naturally enough, like to have the organized service of the regular lines, together with the additional and competitive sailings of tramps, rather than

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regular lines without these. The effect of the tie which the shipowners demand is to compel a choice between the service of regular lines and the sailings otherwise offered.

163. In this consideration, we think, the answer to be found to the argument which has been advanced that, if the advantages above referred to are really to the benefit of trade, they will be supplied under the ordinary operations of the law of supply and demand. We are of opinion that if shipowners were forbidden to use any means to secure custom other than the excellence of their service, the maintenance of a service offering these advantages would become impracticable. Shippers, even while admitting that it would be to their ad-[380]vantage collectively to ship only by the conference lines, would individually ship by tramps whenever a suitable opportunity offered. Indeed, the competition of their fellows would compel them to do so. And the loss of revenue thus occasioned to the regular lines would render it necessary for them to choose between abandoning their services or conducting them in a very different way.

164. In expressing this opinion we do not lose sight of the fact (1) that regular sailings of high-class steamers were given before the introduction of the rebate system, nor of the fact (2) that these advantages have been since and are now given in trades

where the system is not in operation. As regards (1) we would point out in the first place that, though the rebate system did not exist, the contract system did, and in the second place that, as shown in paragraphs 30–34, it was only with the development and extension of regular lines in response to the new demands of trade that the necessity of the rebate tie became apparent. As regards (2), it appears to us that those trades in which the advantages above mentioned have been or are now given without any such tie are cases in which either the conference has for some other reasons a monopoly of the trade, or cases in which the imposition of such a tie would for other reasons be impracticable and unnecessary. An instance of the former cases is the north Brazil trade, of which the Booth Line held the monopoly in an open freight market up to the introduction of the rebate system in 1895. Of the latter an example is the north Atlantic trade for reasons already explained in paragraph 57.

165. The export trade of the United States of America has been spoken of by some of our witnesses as an instance of a trade in which regular sailings and many of the other advantages of an organized service are given without any tie upon the shipper. This presentment of the case, however, is hardly accurate. In the first place the cargo service of the United States of America—we do not refer to those routes in which the passenger traffic dominates the service, as e. g., in the trade to this country—though probably sufficiently organized for the peculiar needs of the trade of that country would be by no means adequate for the needs of the export trade of the United Kingdom. Secondly, such organization as exists is not given without any restrictions upon competition.

The bulk of the exports of the United States consists of raw materials and foodstuffs shipped in large quantities, for which an organized service is not required. The general merchandise is relatively small in amount and in the absence of the rebate system a service with some organization is obtained for it by means of the preferential contracts which the shipping companies have entered into with the large trusts and combinations of manufacturers. These contracts, by insuring the supply of considerable amounts of freight at fixed dates, render it possible for the shipping companies to supply fairly regular sailings and to some extent to maintain rates at a stable level. We would further observe that in several cases the shipping companies carrying from the United States have obtained the security of custom denied to them by United States law in the outward trade by imposing a rebate system upon inward freight. This has been done, e. g., in the trades to the United States from South Africa, the Far East, Calcutta, Madras, Ceylon, and in the trades with South America.

166. We are then of opinion that for the reasons stated above and with the qualification stated in the preceding paragraph, the shipowners are justified in their contention that in supplying the advantages required it is essential for them to have some tie upon the shippers.

167. The only tie brought to our notice in the evidence which in our opinion would at the present day be effective both in binding the shippers and insuring all the advantages of the conference system in the degree in

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which they are now given is the deferred rebate. In certain trades and with regard to certain commodities the support of shippers has been obtained by a system

of contracts. The only advantage urged on behalf of this system, an advantage probably greater in theory than in practice, is that the contract is terminable at a certain date and the shipper is left free to make new arrangements without any such loss as is involved in the case of the rebate. On the other hand, it is open to certain objections. In the first place, to form an [381] effective tie the contract must be for a long period. Secondly, as an alternative to the system of deferred rebates, the contract system does not appear to be uniformly applicable to all shippers in a large and general trade. In those trades in which it is used it is generally confined to one particular commodity, and in every case the shippers are comparatively few in number and well known. There is therefore no difficulty in finding them, and, when their support has been secured by contract, the shipowners have thereby obtained a guaranty of the bulk of the trade. In a large general trade, on the other hand, the shippers are many in number, and they vary from year to year and from month to month. A system of contracts therefore, in a trade of this character, would probably take the form of the system which existed before the introduction of the rebate system. The shipowners, that is to say, would make contracts at low rates of freight with the large merchants who were known to them, and the small and casual shipper would have to pay a higher rate. This is in fact the system which now exists in the export trade of the United States.

168. Moreover, we consider that the agreements under which equal rates are charged on traffic from the United Kingdom and Continent are, in a large degree, attributable to the rebate system, one great merit of which is that the tie which it imposes is an open one and bears on all merchants alike. Were the rebate system to be rendered illegal, it appears to us

That there may be no misunderstanding, won't you kindly acknowledge receipt of this letter?

Yours, respectfully,

SWIFT & Co.,
Per A. R. FAY.

Mr. MOONEY. Many of the outward forms, Mr. Chairman, are in letter form, but they simply differ as to rates.

The CHAIRMAN. Without referring to them in detail, give us the general features of those contracts—in other words, do you give one shipper a less rate than any other shipper under any conditions whatever?

Mr. MOONEY. Yes, sir; we do.

The CHAIRMAN. Now, without referring to any detail, give us the general features of those contracts—in other words, do you give one shipper a less rate than another shipper under any conditions whatever?

Mr. MOONEY. Yes, sir; we do.

The CHAIRMAN. What are they?

Mr. MOONEY. For example, we have contracts for the carrying of sugar. We have one contract that covers a period of three years or more, which averages 70,000 tons of sugar—from 50,000 to 70,000 [635] tons of sugar—originating at one plantation at which there is no ports and no other shipper from that particular place in the island. Southbound—meaning from the States to Porto Rico—we have made various contracts with shippers on a basis of regular sailings, covering a period of perhaps six months or a year.

The CHAIRMAN. Now, at a given time does a large shipper get a more favorable rate than a smaller shipper?

Mr. MOONEY. Yes, sir; all shippers get a more favorable rate possibly at certain times.

that the shipping companies would find it necessary to secure the custom of shippers by the adoption of preferential contracts on a large scale. And whether the abolition of the rebate system in this country would lead to its breakdown on the Continent or not, it seems certain that the adoption of a system of preferential contracts in this country would necessarily involve, to a large extent at any rate, the adoption of a similar system on the Continent. In such a system, necessarily involving arrangements of a secret character, we are of opinion that the same security for the charging of similar rates could not exist. In certain cases, it is true, where shipments of a large quantity are forthcoming, contracts are made by shipping conferences making use of the rebate system, and, where the tie between the British and continental lines is a close one, the terms of these contracts have to be made known to the whole conference. But, if the contract system largely or entirely superseded the system of deferred rebates, we are of opinion that contracts would have to be made so generally and on such a large scale that such consultation would be impracticable.

169. Our opinion on the whole matter may be summarized as follows:

1. The advantages conferred by shipping conferences are substantially dependent upon the system of deferred rebates, or some system equally effective as a "tie" upon the shippers and equally uniform in its application.

2. If the rebate system were abolished, shipowners would endeavor to secure the custom of shippers by making contracts with them covering long periods.

3. The contract system would in large general trades lead to the making of preferential contracts with large at the expense of small shippers.

* * * * *

The CHAIRMAN. Well, take a particular sailing, cargoes going in the same vessel to the same port, of the same commodity. Does one shipper get a more favorable rate than another and, if so, under what conditions?

Mr. MOONEY. Yes, sir; he may in a case of that kind. As I say, there are times when our rates, because of competition which we meet, are, perhaps, lower than the tariff, possibly 50 to 70 per cent. The shipper, who is shipping on that particular steamer, may get 50 to 70 per cent. We have other contracts with shippers for a period of a year, who are willing to make it, perhaps, 25 per cent from our regular tariff on which we guarantee regular sailings, so that he is not interested in an extra discount. He wants us to make a contract with him to provide regular and frequent sailings.

The CHAIRMAN. But those differences in rates only apply to cases where you have a contract with a shipper covering a definite period, say six months or more, and providing for regular sailings?

Mr. MOONEY. Unless the shipper is willing, for any reason, to pay us even more than the best rate we can get at the time the ship is sailing.

The CHAIRMAN. A shipper would not be inclined to do that, would he, unless there was some special inducement?

Mr. MOONEY. He would, sir.

The CHAIRMAN. How is that?

Mr. MOONEY. For instance, there are times when there is a commodity that must move—machinery, perhaps, for sugar mills, that is urgently needed. Our space may be very limited. It may be a peculiar shipment of heavy machinery—boilers, engines, pieces weighing anywhere from 2 to 20 tons—and we may be allowing a discount on that particular steamer, but

[385] TESTIMONY OF MR. WILLIAM BOYD, OF NEW YORK CITY, PRESIDENT OF HOULDER, WEIR & BOYD

Witness sworn by the chairman.

The CHAIRMAN. Give your name and state the line or lines you represent.

MR. BOYD. My name is William Boyd; I am president of Houlder, Weir & Boyd. We represent the American & Oriental Line in the trade between New York, China, and Japan and the Far East, and [386] the American Rio Plata Line, which trades between the United States and Argentine ports.

* * * * *

[390] The CHAIRMAN. You say you have some contracts with shippers in both of these trades? Can you furnish to the committee copies of some of those contracts?

Mr. BOYD. With pleasure. Those are just every-day contracts.

* * * * *

Mr. STEPHENS. Are your contracts generally made with large shippers?

Mr. BOYD. A few with large shippers, because there are only a few large shippers. The majority of our contracts are with small shippers.

Mr. STEPHENS. Do you give a small shipper the same rate of freight you do to the large shippers?

Mr. BOYD. Exactly the same.

Mr. STEPHENS. Is the contract open for any length of time? Do you have one time to make contracts, or is that open always?

[391] Mr. BOYD. Any time a shipper cares to contract we are willing to contract with him.

Mr. STEPHENS. If you make a large contract with a shipping firm today, are you ready in 10 months—if they are made for one year—are you ready in 10

months to make the same kind of a contract, giving the same rate, to a small shipper for the balance of the year?

Mr. BOYD. For the two months?

Mr. STEPHENS. For the two months.

Mr. BOYD. Yes.

Mr. HARDY. It occurs to me that maybe you might have reasonably held to yourselves the right not to do that kind of thing. Suppose tonnage has gone up in the meantime, very much from what it was when you made the contract at the beginning of the year. Now, the 1st of October comes and tonnage is very much higher then than it was when you made that contract; would you still give the balance of the two months on the same rate that you now give?

Mr. BOYD. In the River Plata trade that has been the policy.

Mr. HARDY. You hold that rate for the contractual year as a unit?

Mr. BOYD. Yes.

Mr. HARDY. And make the trades uniform during that year?

Mr. BOYD. Yes.

Mr. HARDY. It seems to me you are more than fair.

Mr. STEPHENS. The contracts you make with those shippers are generally at less rates than the regular tariff rates?

Mr. BOYD. Yes and no. Some of the contracts are at less than the tariff rates. Others, if the shippers wish to be protected against a rise in the tariff, are at the tariff rate. In other words the contract may be at the tariff rate when made, but before the ship gets there it may be less than the tariff rate.

Mr. STEPHENS. But, generally speaking, the rate is a less one than that carried by the regular tariff?

Mr. BOYD. Yes, sir.

[416] TESTIMONY OF HERBERT BARBER, PRESIDENT BARBER & CO. (INC.), 17 BATTERY PLACE, NEW YORK

The witness was duly sworn by the chairman.

The CHAIRMAN. Give the committee your name in full, and your address, also the business in which you are engaged.

Mr. BARBER. Herbert Barber, Englewood, N. J., and my business at present is with Barber & Co. (Inc.), steamship agents and steamship owners, at 17 Battery Place, New York.

* * * * *

[446] The CHAIRMAN. I believe in your testimony yesterday you said you had some contracts with shippers?

Mr. BARBER. Yes, sir.

The CHAIRMAN. Have you copies of those contracts here?

Mr. BARBER. No; I will send them down, if you wish it. In fact, I laid some out on my desk and intended to bring them when I came down, but for some reason I overlooked them.

The CHAIRMAN. We will be glad if you will do so.

Mr. BARBER. I suppose I will be down next week or the week after. I will proceed to let you have them before you get through with the proceedings.

The CHAIRMAN. Tell the committee whether or not you give to the large shippers and the small shippers the same rate; in other words, is there a discrimination between large shippers and small shippers in the rate given them?

Mr. BARBER. As far as the River Plata and the Far East, China and Japan, we do. We try to make the same rates to each, although sometimes we will give a man a contract rate, if he will give us his business

for the entire year, and a better figure than a man who simply ships a carload here and ships a carload somewhere else next time.

The CHAIRMAN. Do you give a man who makes you that kind of a contract the same rate?

Mr. BARBER. We do.

The CHAIRMAN. Without reference to the tonnage he may ship?

Mr. BARBER. Yes; but if we find a man—a little pettifogging man—we would not want to make a contract with him. We would not want to bind our files up with a small shipper of that kind. Any man who is a good-sized man we will make a contract with him.

The CHAIRMAN. But you will not do it for the small shipper?

Mr. BARBER. No.

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[447] TESTIMONY OF JOSEPH T. LILLY, OF NORTON & SON, PRODUCE EXCHANGE, NEW YORK

The witness was duly sworn by the chairman.

The CHAIRMAN. Please give your name to the committee, your address, and your business.

Mr. LILLY. Joseph T. Lilly, a member of the firm of Norton & Son, Produce Exchange, New York.

The CHAIRMAN. What is your business?

Mr. LILLY. Steamship agents and brokers.

* * * * *

[460] Is that the agreement in effect between your lines in the Australian trade?

Mr. LILLY. Several owners furnish the steamers and probably arrange the sailings to fit in with the position of the steamers.

The CHAIRMAN. That is what I am trying to get at. I believe you say there are no deferred rebates?

Mr. LILLY. No, sir.

The CHAIRMAN. Or other privileges or advantages to shippers?

Mr. LILLY. No, sir.

The CHAIRMAN. Do you make any contracts with shippers?

Mr. LILLY. Yes, sir.

The CHAIRMAN. Do you grant to the larger shipper a different rate than that which is given to the small shipper?

Mr. LILLY. No, sir; every shipper gets the same rate, and when we make a contract, if that rate is lower than the then tariff rate or current rate, we reduce our tariff or current rate to be the same as that contract rate, so every shipper gets it without a contract.

Mr. HARDY. Do you mean to say that if you made a yearly contract with one man you put your tariff rates down to that yearly rate?

Mr. LILLY. Yes, sir.

Mr. HARDY. Then you have one single yearly rate that would prevent you raising your rates during that year to a customer, would it not?

Mr. LILLY. Yes, sir; it has done so.

Mr. HARDY. That would destroy your right of changing your rates—just one contract would do it, would it not?

Mr. LILLY. But we do not make contracts for everything. One man makes a contract for automobiles, another for agricultural machinery, and another for lubricating oil, etc.

Mr. HARDY. So that when you make one yearly contract with reference to a certain article you can not change that rate after that to anybody else, can you?

Mr. LILLY. We do not change it. We made a contract last year for automobiles, and we raised our

rates during the year 5 shillings and did not raise the automobile rate.

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[573] TESTIMONY OF MR. PHILIP A. S. FRANKLIN, VICE PRESIDENT OF THE INTERNATIONAL MERCANTILE MARINE CO., NEW YORK

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[615] The CHAIRMAN. We were referring to agreements with shippers.

Mr. FRANKLIN. Now, I have here the form, the only form that we have in our eastbound agreement with shippers, and I have just had them give me two at random, which I would rather not submit in that way for the record, because they have the name and rate of freight, but there are the blanks which are exactly verbatim to these.

The CHAIRMAN. That is the form of the agreement?

Mr. FRANKLIN. That is the form of the agreement.

The forms of agreement here submitted by Mr. Franklin were marked for the stenographer Exhibit No. 64.

The CHAIRMAN. Is that the only form of agreement?

Mr. FRANKLIN. No, sir; the great majority of our agreements are made on either brokers' notes, which is really only a memorandum sent along by the freight broker to us, or by letter. As a general proposition our shipping arrangements with the firms are not made on any agreement—simply confirmed by brokers on brokers' notes and we pay the broker 1¼ percent.

The CHAIRMAN. Are there any deferred rebates on eastbound traffic?

Mr. FRANKLIN. No, sir.

The CHAIRMAN. Are there any discriminations between shippers on the freight eastbound?

Mr. FRANKLIN. No, sir.

The CHAIRMAN. Any discrimination between the shippers on the freight eastbound?

Mr. FRANKLIN. No, sir. The shipper can get at the same time—any shipper can—at the same time and under the same conditions, the same rate.

The CHAIRMAN. What are those conditions?

[616] Mr. FRANKLIN. It is entirely a question of supply and demand. If a grain shipper comes in tomorrow and wants a rate of freight for next June, we may name him, as we would today, 3½ pence; if we took all the June shipment of corn that went at 3½ pence, our next day may be 4 pence, but every shipper gets the same rates for the same condition.

The CHAIRMAN. Irrespective of quantity?

Mr. FRANKLIN. Yes; irrespective of quantity. If a man came in with a tremendous quantity of grain and made a firm offer, we may find it would be a big influence to have to break the rate for the time being, but then we would probably take in the same load at the same rate. The rate once broken establishes it. It is a question of supply and demand, and a question of what steamer can be employed and how they can be used.

The CHAIRMAN. The purpose being to employ it——

Mr. FRANKLIN. In the most profitable way you can; and I venture to say that the average tramp steamer could not be chartered and put into any of the United Kingdom and continental trade and take their general traffic and pay its way.

Mr. HUMPHREY. They would not have the same facilities you do, would they?

Mr. FRANKLIN. They would not have the same facilities that we do in one sense of the word, but

their facilities might cost them less if they charged them up, because they may be able to go to some place and get wharfage at very much less than our ships, because we have to have proper terminals. They only come in occasionally, but the disadvantage is on general cargo; that is the point I made this morning. They are on an equal basis when it comes to big, bulk traffic. I would not say "equal," but pretty close to being equal; but when it comes to general cargo they are not on an equal basis.

Mr. HARDY. When a contractor wants to ship out a lot of lumber from southern ports, they can get a chartered vessel that will be on the same basis and have the same facilities that you might have?

Mr. FRANKLIN. Yes; he may have to pay a little bit more on terms, but that is all there would be.

The CHAIRMAN. When it comes to regular trade and regular cargo which must be dispatched at regular intervals they can not compete and could not maintain themselves at the same rate?

Mr. FRANKLIN. Could not maintain themselves at the same rate, and they could not compete, because the merchant must have regular service and ship every week, and he is quite ready to pay the regular line more than the tramp ship, in order to get those facilities for the miscellaneous general contracts. A great many of them want to make contracts for the balance of the year and sell goods on those contracts. They do not want a fluctuating rate; they want a fixed rate; they want to know when they are going to go and what facilities they are going to have.

The CHAIRMAN. Because they realize that the rate may go up. If it would go down they would not be concerned. That is the reason they make contracts.

Mr. FRANKLIN. Just like that contract I have sub-

mitted, because that settles them for the balance of the year.

The CHAIRMAN. If there is a chance of the rates going down, rather than going up?

[617] Mr. FRANKLIN. The chance that the rate is going down is not going to hurt them, but if it should go up it would hurt them.

The CHAIRMAN. I say, the chances of the rates going up is the inducement for them to enter into the contract?

Mr. FRANKLIN. That is right; it is a protection to the shipper.

The CHAIRMAN. Where you have this contract, is it the understanding that the shipper shall give all his shipments to the line?

Mr. FRANKLIN. It is always a matter of stipulation. There are some shippers who will make a contract with you, in accordance with this form of contract, whereby we are to get all the business of this shipper for the balance of the year. Another shipper may come in. He may want to ship 12,000 or 15,000 tons of stuff, and he may say, "I would like to ship and make a contract with you to give you 8,000 tons. I will want to keep my other 4,000 or 7,000 tons to be moved as I see fit," and as long as he commits himself to the rate that we agree upon it is quite satisfactory. We will always try to get as much business as we can from the shipper.

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[625] The CHAIRMAN. We want to get back to the question of publicity. I want you to develop that idea, how far we should go in the way of legislation.

Mr. FRANKLIN. The only thing we feel could possibly be done—and I do not know whether the majority of the shipping trade agree with me on that or not—is the question of filing the rates at some place

in Washington for general supervision, to which shippers can apply and see what rates are in force at the time and what other people are getting. We feel there is no other way to conduct our business except by working together in the manner in which we are now working.

The CHAIRMAN. Well, of course, if this discrimination or rebating exists in any trade, would it not be a good thing to prohibit that?

Mr. FRANKLIN. Absolutely. And I think this, that the object in filing it would be that there is the rate of that day. We would have to prove in the case of any difficulty that we offered to a shipper that rate on that day, that everything was equal to all, and equal chance [626] to everybody to ship at that time. We might get all we wanted today, and we might be out of the market tomorrow.

The CHAIRMAN. Do you say, with reference to deferred rebates also, that they should be prohibited by law?

Mr. FRANKLIN. We have never used deferred rebates, and I know very little about them. They have been, by people who have used them and by lines who have used them, found very advantageous not only to the shippers, but to the steamship companies. But I think the sentiment in the United States regarding the rebates is such that I do not care about advocating that we be allowed to have them.

The CHAIRMAN. Some of the shipping lines, as well as some of the merchants, I think, have voiced the opinion that they ought to be prohibited by law.

Mr. FRANKLIN. The very word "rebate" in the United States has not a very satisfactory meaning. I do not think there is any use of our pressing for anything of that sort.

The CHAIRMAN. Then, again, with reference to the

agreements between the conference lines, what do you say about the law requiring those agreements to be filed, say with the Interstate Commerce Commission or some other like tribunal, instead of having all this doubt as to whether or not they are legal, and remove any controversy of that sort.

Mr. FRANKLIN. I feel that the present position of the steamship companies is rather an unfortunate one, where all their agreements are looked upon with suspicion, more because the other fellow does not know what is in them than because of what is really in them, and I think, as far as agreements pertaining to business from the United States are concerned, it would not be at all prejudicial to business to have them filed.

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[629] TESTIMONY OF MR. FRANKLIN D. MOONEY, VICE PRESIDENT AND GENERAL MANAGER OF THE NEW YORK & PORTO RICO STEAMSHIP CO. AND GENERAL MANAGER CLYDE SANTO DOMINGO LINE, 11 BROADWAY, NEW YORK, N. Y.

* * * * *

[632] The CHAIRMAN. Have you any such agreement or understanding, regarding deferred rebates, or other privileges and advantages?

Mr. MOONEY. We have none.

The CHAIRMAN. As between yourselves and shippers?

Mr. MOONEY. We have none with other lines nor with shippers. I might say, however, on that point, sir, we have special contracts with shippers, but no system of rebates.

The CHAIRMAN. Have you sample copies of those contracts showing the different forms?

Mr. MOONEY. I have, sir, here, and will be glad to furnish them.

The CHAIRMAN. You may furnish the committee a copy of each contract, showing the form of contract in existence between yourselves and the shippers. We do not want all the contracts, but we want every different form of contract between yourselves and the shippers.

Mr. MOONEY. I think, perhaps, a form for the outward and a form for the homeward would cover that, and I will leave them with the stenographer.

The CHAIRMAN. Let them be identified as exhibits.

The documents here submitted by the witness were marked by the stenographer "Exhibit No. 66," and are as follows:

EXHIBIT NO. 66. SWIFT & CO., "PONCE" REFRIGERATOR CONTRACT, FROM JUNE, 1912, TO MAY, 1913

Memorandum of agreement made at New York this 23d day of May, 1912, between Swift & Co., hereinafter called the "Shippers," and the New York & Porto Rico Steamship Co., hereinafter called the "Steamship Company."

In consideration of the sum of $1 paid by each to the other, receipt of which by each of the parties hereto is hereby acknowledged, and of the mutual covenants herein set forth, the parties hereto agree as follows:

1. The Steamship Company agrees that during the life of this contract and subject to the conditions specified below the Shippers are to have the exclusive use of both ice boxes or refrigerators at present installed on the steamship PONCE, for the transportation of fresh meats and other perishable products of the Shippers, at the rate of $700 per trip from New Orleans, La., to San Juan, P. R. (landed on dock at the latter port).

* * * * *

[633] VIII. It is mutually agreed that the shippers are to have the privilege of forwarding via steamers of other lines than those of the New York & Porto Rico Steamship Co. 10 per cent of all their provision shipments between the United States and Porto; but in consideration of the rate named hereunder on the *Ponce's* refrigerators, it is understood that during the life of this agreement all their remaining provision cargo is to be shipped by the steamship company's vessels.

IX. It is further mutually agreed that if any general reduction is made by the steamship company in its present freight rates on commodities handled by the shippers, the latter are to have the proportionate benefit of such reduction [634] during the period for which it is in force, except that no reduction is to be made in the rates herein named on the *Ponce's* refrigerator space.

In witness whereof the said companies have executed this agreement in duplicate the day and year first above written.

SWIFT & CO.,
By A. R. FAY.
THE NEW YORK & PORTO RICO STEAMSHIP CO.,
By FRANKLIN D. MOONEY,
Vice President and General Manager.

Witnesses:
GEO. D. CHASE.
JNO. E. CRAIG.

DECEMBER 6, 1912.

MESSRS. SWIFT & CO.,
Chicago, Ill.

GENTLEMEN: We acknowledge receipt of yours of the 30th ultimo, file E–217, which agrees in essential

[864] TESTIMONY OF R. P. SCHWERIN, VICE PRESIDENT AND GENERAL MANAGER PACIFIC MAIL STEAMSHIP CO. AND SAN FRANCISCO & PORTLAND STEAMSHIP CO., SAN FRANCISCO, CAL.

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[879] Mr. SCHWERIN. For 20 years we have had an understanding with the Apgar Line on gunnies from Calcutta to Pacific coast points, and all the lines operating across the Pacific have worked under that agreement.

The CHAIRMAN. Tell the committee what that agreement is.

Mr. SCHWERIN. That is a contract for the movement of gunnies at a certain rate, provided it is shipped in certain quantities, which has varied from the contract system down to the deferred rebate system. At the present time it is the deferred rebate system.

The CHAIRMAN. I did not catch that last remark.

Mr. SCHWERIN. At the present time it is the deferred rebate system.

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[904] Mr. HUMPHREY. In other words, it has reached a condition where competition in modern ocean-carrying trade is likely to lead to a monopoly by the stronger one devouring all the others?

Mr. SCHWERIN. Competition produces ruin to the weak man and strength to the strong man eventually.

Mr. HUMPHREY. Until it results in a monopoly?

Mr. SCHWERIN. Yes; a monopoly. Now, it is much better for the public to be served at reasonable rates and afforded plenty of service than it is for the public to be served by cut rates, nobody knowing what the other fellow is getting, the merchants only getting the advantage of each other; that is, the big merchant having the advantage over the little merchant. It is not only a question of the little carrier over the big

with the writer's conversation with your Mr. Chase except that this agreement will not cancel contract now existing.

The understanding is that the Porto Rico Line will transport not less than 90 per cent of packing-house products shipped by Swift & Co. from New York at our present tariff rate less 25 per cent, and Swift & Co. reaffirms agreement to confine to our line not less than 90 per cent of the packing-house products moving to Porto Rico.

Yours, truly,

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General Freight Agent.

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[634] PORTO RICAN CONTRACT

CHICAGO, *November 30, 1912*

Mr. V. K. HULL,
General Freight Agent, New York & Porto Rican Steamship Co.,
11 Broadway, New York, N. Y.

DEAR SIR: This will confirm our telegram, 29th instant, advising we would accept the proposition you made our Mr. Chase, in New York on Monday, that on all Porto Rican provisions we may ship via your steamers from New York from date to end of December 1913, we are to pay you your present tariff rates less than 25 per cent, and it is further understood that we are to ship via your steamers 90 per cent of our Porto Rican business. This new arrangement to cancel any previous agreements we may have had with you.

carrier, but of the big merchant over the little merchant, because the big merchant, in a rate war, always gets the advantage over the little merchant; the carrier goes after the big fellow to get a lot of freight and gives him the advantage.

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[921] The CHAIRMAN. What would you say as to the practicability and desirability of requiring contracts with shippers to be filed with the commission, not to be made public, but merely to compel them to be filed with the commission?

Mr. SCHWERIN. There again, if you will permit me, I criticize the question of these things being compulsory. I should think that the law would be better if the Government had the right at any time to call on the steamship companies for contracts they might have with shippers, or call on shippers for any contracts they might have with carriers, having the right to cancel or abrogate or do what it pleased with them if, in its opinion, they thought we were doing something wrong, but to let the business go on and let us make contracts with the knowledge that the Government has the power to call for them.

The CHAIRMAN. If complaint was made that there was discrimination, the Government would have the power to call for the contract and determine whether or not there was just cause for complaint.

Mr. SCHWERIN. Yes.

[922] Mr. HARDY. What would be your suggestion in case the remedy in the hands of the Government was not adequate; to allow it to continue?

Mr. SCHWERIN. Oh, no; just to cancel it. A man is trying to do business, and there is no reason why that should not reach the evil results, because the Government officer can call for these things as often as he likes.

would not name on that particular shipment the lowest discount.

The CHAIRMAN. Of course, under those circumstances, he would rather pay the higher rate than to wait for another steamer?

Mr. MOONEY. Yes, sir.

The CHAIRMAN. Have you a copy of your tariffs between New York and Porto Rico?

Mr. HARDY. It seems to me you have not quite answered the question of the chairman as to whether or not, the conditions being precisely the same, you ever give preference to one shipper over another?

Mr. MOONEY. No, sir; we do not if conditions are identically the same.

Mr. HARDY. In other words, here is a man with 20,000 tons wanting to ship, and another man with only a thousand tons and there is nothing to cause a distinction except the amount——

[636] Mr. MOONEY. Unless it be, sir, the conditions that surround the loading of it in the West Indies. In Porto Rico, for example, there are many places where we load sugar where the absence of a harbor would prevent our loading more than 2,000 bags a day, while there are other places where we might load eight or ten thousand bags.

Mr. HARDY. But suppose you are in the same harbor. I have freight there and another man has freight there; one is a big man and the other is a little man. Do you ever make any distinction between the two men on account of the quantity of the shipment?

Mr. MOONEY. Yes, sir; we do.

Mr. HARDY. Take the case I put of 20,000 tons and 1,000 tons; that is the only difference there is between them. What amount of difference do you make in that case?

Mr. MOONEY. In the case of the 20,000 tons perhaps we would name a rate, and in the case of the 1,000 tons we try to get perhaps a little more for it.

Mr. HARDY. In other words, you do make a reduction for large quantities?

Mr. MOONEY. Yes, sir; we do.

The CHAIRMAN. Now, give us the names of the shippers that get these lower rates.

Mr. MOONEY. We have no regular tariff; we have a basic tariff, we make our rates according to conditions and they naturally vary. We have arrangements with a great many shippers. I can give you a list, however, of those with whom we have special contracts, perhaps 9 or 10.

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[649] The CHAIRMAN. Referring to your contracts with shippers northward from Porto Rico, do they include a provision to the effect that the shipper must patronize your line exclusively?

Mr. MOONEY. When we make a contract, principally on sugar, if that is the only contract trade we have north, we contract for the output of an entire central or mill, as appears from the copies of the agreement I left with you this morning, there being no other shipper in many of those places, merely a plantation or mill.

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[651] TESTIMONY OF CHESTER B. KELLOGG, GENERAL FREIGHT AGENT MUNSON STEAMSHIP LINE, 82 BEAVER STREET, NEW YORK, N. Y.

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[653] The CHAIRMAN. Have you any contracts with shippers?

Mr. KELLOGG. We have. I have a couple of contracts here, which I will be glad to give to the commit-

tee. I would prefer that they would not go into the records, if it so pleased you.

The CHAIRMAN. Just let them be marked for identification as exhibits.

[654] The four documents here submitted by the witness were here marked by the stenographer "Exhibits 71."

The CHAIRMAN. Are deferred rebates or other privileges or advantages granted in those contracts submitted, or have you any contracts with shippers, either to or from Cuba and from ports in the United States, granting deferred rebates or other privileges or advantages?

Mr. KELLOGG. We have not.

The CHAIRMAN. Do you discriminate against shippers—that is, give one a more favorable rate than another?

Mr. KELLOGG. We have made every endeavor in our business to keep all lines of trade on an equal basis.

The CHAIRMAN. How have you succeeded?

Mr. KELLOGG. Very well.

The CHAIRMAN. Have you any exceptions to the rule?

Mr. KELLOGG. None except those which might be affected by a contract. A man who makes a contract with us for a year might, in some cases, be paying more freight if competitive conditions had forced our rates down at different times.

The CHAIRMAN. Is it a fact that he does that?

Mr. KELLOGG. He has done it in several cases; yes.

The CHAIRMAN. Are there any such contracts existing now?

Mr. KELLOGG. There is one contract, which I have handed in here, entered into with a firm in New York, which exports to their own plantation and uses its

own goods—uses its own materials on its own plantations. There is one other contract, which is made with a railroad in Cuba, which buys all its own supplies and utilizes them on its railroads.

Mr. WILSON. Would there not also be different rates on some of those contracts—where one would have a rate less than the others on the same ship?

Mr. KELLOGG. It might be so; yes.

Mr. WILSON. Has it actually been so?

Mr. KELLOGG. Yes; it has been so. It would naturally work both ways.

Mr. WILSON. Is not that generally the case that those who make contracts with you have a less rate than the others.

Mr. KELLOGG. They naturally expect to get some benefit out of it, either in service or in rates.

The CHAIRMAN. What proportion of your northbound freight is contract freight?

Mr. KELLOGG. I can not answer for the northbound freight, excepting that one commodity—that is, sugar; practically, that is the basis of the northbound cargo.

The CHAIRMAN. And constitutes the larger part of it?

Mr. KELLOGG. Constitutes the larger part of it; yes, sir.

The CHAIRMAN. What proportion of your freight to Cuba is contract freight?

Mr. KELLOGG. Practically none.

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[684] TESTIMONY OF MR. F. KINGSBURY CURTIS, 30 BROAD STREET, NEW YORK, N. Y.

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[706] The CHAIRMAN. Right along that line, you have contracts with shippers?

Mr. CURTIS. We have sugar contracts, but very few south. The northbound shipments of sugar are practically under contract, because the man has to know how his sugar can be shipped. He sells it against documents, and so on, and he makes those arrangements almost always in advance. Very little contract business southbound, except for machinery.

The CHAIRMAN. Do you give to the shippers the same rate?

Mr. CURTIS. Yes; they all talk it over and they get about the same rates before you get through with them. Not the same rates, but they figure out practically equivalent, for this reason: If a port can only deliver 1,500 bags to you in a day, and another port can deliver 4,500, it means you have got to stay three days to get one man's sugar and one day to get the other man's sugar. They just add that. They know what they can do. They add the ship's time, and if you do not meet them on it you do not get the business.

The CHAIRMAN. They are practically the same, considering local conditions?

Mr. CURTIS. Just about. They all talk it over.

The CHAIRMAN. Take the southbound freights. You have special contracts, do you?

Mr. CURTIS. I do not think any quantity, not with the ordinary shipments. It is all under those circulars.

The CHAIRMAN. You have no contracts with shippers on the southbound trade?

Mr. CURTIS. I could not answer that, because I do not know, but I think we have some contracts. I think soap is usually shipped under contract—stuff that moves in very large volume is apt to be shipped under contract.

The CHAIRMAN. Are all the shippers on the same commodity given the same rate?

Mr. CURTIS. As nearly as possible; yes. The United States Government, for instance, requires contracts on all its shipments, and they get, I should say, 20 per cent below the tariff—below the ordinary shipper. The Quartermaster's Department has a contract. I think we have a quartermaster contract. There has been a general theory that the Government should get 20 per cent off in Porto Rico. I think the Government's passenger used to get 20 per cent off. The Porto Rican Government has a large irrigation work that is under contract, and they get very low rates on that, but it is only a small percentage of the business, and usually it is business of a special character. The ordinary shipper out of New York, I think, the [707] export merchant, I think, gets the published rates from all these lines. There has never been any complaint that I have ever heard of on the subject of rebates or anything of that sort in the Porto Rican trade; one reason is there has never been any traffic agreements to maintain rates.

Volume 2: Hearings

[754] TESTIMONY OF MR. JOHN AUSTIN MCCARTHY, STEAMSHIP AGENT AND SHIP BROKER, PHILADELPHIA, PA.

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[767] The CHAIRMAN. Do you think discrimination should be prohibited?

Mr. MCCARTHY. Yes; I should think so. Well, of course, now I do not know. I will qualify that. It would depend on the volume of business a great deal. I do not think a man shipping 10 tons should get the same rate that a man shipping 100,000 tons should get.

The CHAIRMAN. But in any event, that question should also be subject to supervision?

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[767] The CHAIRMAN. Is there any discrimination between shippers on the contracts you make with them?

Mr. MCCARTHY. No; they are our rates to everybody.

The CHAIRMAN. Do all shippers by your line get the same rate?

Mr. MCCARTHY. Of course, as I say, if they make large contracts they are made in New York. We will say the International Harvester Co., for instance, will ship several hundred thousand tons of machinery; that is made up by special contract.

[768] The CHAIRMAN. And they get a special rate, do they not?

Mr. MCCARTHY. Yes.

The CHAIRMAN. And of course one provision of that contract is that they shall ship so much and that they shall ship by conference lines?

Mr. MCCARTHY. Yes.

Mr. HARDY. Is not the effect of giving special rates to special large contracts simply to place a still greater power in the big concerns to crush out the little ones? If the Harvester Co. can get one-half the rate that any other manufacturer of the same goods can get, that adds to their advantage over the independent concern, does it not?

Mr. MCCARTHY. It adds to the cost, yes; but then, looking at it from the steamship standpoint, the volume of freight is worthy of some consideration.

Mr. HARDY. Very true, but if you were required to fix a definite rate for all parties that would put all parties on equality, so far as shipping?

Mr. MCCARTHY. Yes.

Mr. HARDY. And your discriminating so as to give a 100,000-ton man 20 per cent over the 10,000-ton man knocks that 10,000-ton man out, does it not, in the trade?

Mr. MCCARTHY. I do not know of any 10,000-ton man in the trade.

Mr. HARDY. I am just illustrating.

Mr. MCCARTHY. Well, say a local shipper in Philadelphia will forward one car, or something like that, I do not think he ought to have the same rate as the man who will ship 100,000 tons.

Mr. HARDY. But the privilege of making that distinction is the basis on which the big man slaughters the little man, is it not?

Mr. MCCARTHY. It seems that way.

Mr. HARDY. As a matter of fact, such discriminating is in favor of the big man, is it not?

Mr. MCCARTHY. Yes.

Mr. HARDY. Ought that be permitted if we want at all to have any independent concerns in this country?

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[769] TESTIMONY OF MR. ERNEST M. BULL RESUMED

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[782] Mr. HARDY. I was getting your idea. What do you think about this other idea of requiring shippers to take the cargo in the order in which it was tendered, so they could not strand a man if they did not want to give him service?

Mr. BULL. There would always be the question whether a man wanted to send his boats to a particular port. I think, as far as package freight is concerned in a line, that should be taken in the order it is tendered, and I think in most cases it is.

Mr. HARDY. I am satisfied that in most cases the carrier could do whatever he thought proper by shov-

ing him off to the last and exposing him to new conditions.

Mr. BULL. I think where there have been combinations and where there have been conferences, some fellow that has gone outside, probably—I do not know, but we hear complaints that some fellow has been disciplined simply by saying, "My ship is full," etc. I know when we first started to Porto Rico different merchants said, "Well, now, are you going to stick? Because we do not want to get in a position, if you drop out, that these fellow will tell us, 'we are full now.'"

Mr. HARDY. That is what I am asking about. Should there be any law prohibiting such "discipline," as you call it?

Mr. BULL. Yes; I think there should. I think that should be one of the things that your commision should have charge of, just exactly as they do on the railroads. A railroad has to place cars in direct order as the orders for the cars come in. Now, let him take [783] his freight on all line business as it comes in. Of course, where he has a contract for so many tons a month or a week, that would be a prior order.

The CHAIRMAN. Is there anything further?

Mr. PORTER. What method would they adopt to "discipline" a shipper?

Mr. BULL. To discipline a shipper?

Mr. PORTER. Yes. I would like your idea of the meaning of that word or the effect of it.

Mr. BULL. Oh, why, for example, suppose a shipper had been using sailing vessels instead of using a regular line steamer to Porto Rico, and the lines running are going to sail next Saturday, and had a great deal of freight offered them to fill the space. A man comes in and says, "I have some stuff which

I am very anxious to get off on next Saturday's boat." They would say, "We are very sorry. We have not room." It is pretty hard to prove that sort of thing.

Mr. PORTER. Would they say that when they did have room?

Mr. BULL. They might know in their own minds of somebody else who was coming in to give them something else, and probably they would not have room at the time the steamer sailed; but I have heard it stated that this happens sometimes.

Mr. PORTER. That is to say, when the shipper did something which the shipowner did not like they would "discipline" him by refusing to take his freight?

Mr. BULL. Or delay his freight. I think that has been done. I do not know of any particular case of it.

Mr. PORTER. The effect of that would be ruin?

Mr. BULL. So they would keep that in mind the next time and would not go outside of the regular channels.

Mr. PORTER. The word "ruin" could be used instead of "discipline"?

Mr. BULL. Well, no; because it is not likely it would be carried as far as that. He would probably be "good" before it had gone to that extent.

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[801] TESTIMONY OF MR. W. G. SICKEL, VICE DIRECTOR IN CHARGE OF TRAFFIC OF THE HAMBURG-AMERICAN LINE—CONTINUED

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[825] Mr. SICKEL. But the principal reason we have not direct competition from others is that in the North Atlantic we run largely what we call the combination freight and passenger steamer.

The CHAIRMAN. Yes; you have gone over that.

Mr. SICKEL. And we make a freight rate that is not attractive to the outsider to compete with us.

The CHAIRMAN. Is there not another element that keeps out an ambitious rival—what is known as the fighting fleet of Hamburg? To be more specific, is it not true that a corporation known as the Syndikats-Rhederei, a corporation which operates the fighting ships of the six largest Hamburg companies engaged in extra-European trade; a company which is nominally a vessel-owning company with a capital of $1,428,000, engaged in a commercial enterprise, but which actually, is a defensive corporation owned, in respect to the capital shares, as follows:

Hamburg-American Line	$785,400
Hamburg-South American Line	166,600
German Steamship Co	154,700
German-Australian Steamship Co	130,900
C. Woermann	119,000
German-East Africa Co	71,400

Or a total capital of $1,428,000.

Is not this company owned and controlled in the proportions I have given by these several companies trading out of Hamburg, and the ships used as fighting ships in trades and as against other companies that may threaten to come into competition with them?

Mr. SICKEL. Whether that company exists now or not I can not say, because I have very little knowledge of it. I do know, positively, that at one time it did exist.

The CHAIRMAN. And for the purpose I have stated—as fighting ships?

Mr. SICKEL. That was the purpose of the organization of the company.

The CHAIRMAN. My information is to the effect, further, that in the distribution of shares they were

apportioned with reference to the tonnage of the companies named, and that this fighting corporation was organized on December 19 and registered on December 23, 1905, and that one-half the original capital was paid in immediately. Also, that four comparatively small and inexpensive ships were purchased and used, with such others as might be chartered from time to time, and hired out to the six owners of the company to meet dangerous competition and to drive it away; that the fighting ships handled chiefly bulk goods, leaving merchandise which requires prompt transportation to the care of the parent company, which maintains its nominal rates as far as possible, the stress of competition being borne by the fighting ships, technically. Also, that in the times of peace the fighting ships engage in regular trade on time charters, and that, as this corporation is not one for profit, primarily, the investment, in reality, is a new sort of insurance. My information, further, is that the Syndikats-Rhederei made no money at the beginning of its history, this fact indicating that the ships were actively engaged in commercial warfare, but that last year the [826] returns were favorable, as rates, generally speaking, were higher and the regular lines required less expensive support.

As I say, that is our information, and this line, as we understand, is still in existence and for the same purpose, whenever necessity may require. What information have you on that?

Mr. SICKEL. I have no information direct from my principals that that exists, but it is a well-known fact that the Syndikats-Rhederei does exist. I have never before heard the division of the shares among the different lines, but the purpose, I do believe, is as stated here.

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Mr. HARDY. What good would it do to a man who had been run out of business by lower rates being given to his competitor if that is simply being found out after he is suppressed?

Mr. SCHWERIN. He would probably scream long before that time.

Mr. HARDY. He might not know where he was hurt for a good while.

Mr. SCHWERIN. By golly, he ought to go out of business if he does not know where he is being hurt.

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[1250] STATEMENT OF MR. B. N. BAKER, RETIRED STEAMSHIP MAN, BALTIMORE, MD.

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[1252] THE CHAIRMAN. In your experience, to what extent have these fighting ships been employed?

Mr. BAKER. It is very hard to say. You see, I have been out of the business for some years. Now, for instance, the Atlantic Transport Co. used to carry all the Bass's ale. We made an allowance of about 10 per cent reduction on the rate provided the Bass's ale people would ship no ale but by the Atlantic Transport Co. At that time some one would now and then put on a ship to load from London to New York—our particular trade. We would not hesitate to refuse the Bass's people their commissions on that at that time.

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[1255] Mr. BAKER. * * * You must be in a position as to steamship rates to meet those conditions at a moment's notice, as they vary from day to day. Take the grain and flour traffic, and a great many of the commodities in which it is absolutely necessary to make alterations in rates from time to time. I think you are perfectly just and reasonable and that the

steamship companies would regard it as a very reasonable request that they file all the agreements and conditions they have made, and I do not know of any company that would not be willing to do it.

The CHAIRMAN. Including contracts with shippers?

Mr. BAKER. Yes.

The CHAIRMAN. It would be fair also if the law provided they should not discriminate between shippers?

Mr. BAKER. Under exactly similar circumstances. I am a steamship man, and we will suppose I am loading my ship. I have so much space left; I can carry so much measurement cargo, but not any weight cargo. If I send that ship over with all that space vacant, it is all dead loss and I get no revenue from it. * * * Oftentimes it would pay to go out and take a hundred tons of measurement cargo at any rate. It would not be a question of revenue or discrimination, but it is a question of meeting actual business—physical condition which must be met. So you could not make a hard and fast rule to govern it in the oversea transportation, as you could in the coastwise business or in transcontinental rates. There is a different situation there.

Mr. HARDY. Would not that exemption actually destroy any possible effort at regulation at all, because while you say these conditions exist, it would nevertheless enable a company that saw proper to always meet any charge of discriminations by saying conditions were different?

Mr. BAKER. Yes.

Mr. HARDY. So that practically, if you are right, you can make no law prohibiting discriminations?

Mr. BAKER. It is practically so, Judge Hardy. You might—I am not a lawyer—but it seems to me that you might have all those contracts filed, and if

you found an unjust exercise of that right, penalize them; they would not hesitate to comply.

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[1302] TESTIMONY OF MR. F. A. MEYER, GRAIN EXPORTER, BALTIMORE, MARYLAND

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[1312] Mr. HARDY. Do you think that these steamship lines should be required to file their contracts, if any, made with individual shippers?

Mr. MEYER. I certainly see no objection to it.

Mr. HARDY. Do you mean that should be simply filed or that it should be published in any publication?

Mr. MEYER. I must say I really do not see the object of that, because I believe there is no favoritism or rebate system in the ocean freight business, so far as it relates to any business with which I am concerned.

Mr. HARDY. That is in the eastbound ocean freight. But there is a suspicion of some pooling and rebates of shipments in the United States.

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[1313] Mr. HARDY. You spoke in your testimony of the fighting-ship proposition. Would you by law forbid these powerful combinations from utilizing fighting ships to cut down or kill competition?

Mr. MEYER. I think it would be a reasonable thing to do, if it could be done.

Mr. HARDY. In what way would you undertake to prevent the use of fighting ships by the powerful combinations to put down the little fellows? Would you penalize it?

Mr. MEYER. I think so. The object of the fighting ship is to destroy the trade of the other person, irrespective of profit or anything else.

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[1357] REPORT SUBMITTED TO THE COMMITTEE ON THE MERCHANT MARINE AND FISHERIES BY THE COMMITTEE APPOINTED BY THE REPRESENTATIVES OF STEAMSHIP LINES MAINTAINING ESTABLISHED SERVICES FROM NEW YORK TO FOREIGN COUNTRIES, INCLUDING PORTO RICO AND THE PHILIPPINES.

NEW YORK, *March 3, 1913.*

To the Honorable the Committee on the Merchant Marine and Fisheries, Washington, D. C.

GENTLEMEN: The representatives of most of the steamship lines which maintain established services from the port of New York to foreign countries, including Porto Rico and the Philippines, have appointed the undersigned a committee to act for them. We have carefully considered the evidence brought out at the public hearings, and have sought and obtained the views of the trade generally. While complete unanimity of opinion is not to be expected, yet we find substantial agreement on all matters of importance, and we have therefore prepared the following memorandum, which we beg leave to submit for your consideration, and we respectfully ask that it be printed and made a part of the record.

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[1360] * * * The evidence shows that the agreements or understandings which exist in many branches of our commerce have been, without exception, the natural outgrowth of intolerable competitive conditions rather than the result of studied effort on the part of any interest or combination of interests to control particular branches of the trade; and if such agreements had not been reached, the cooperation of a number of lines for the development and handling of the trade would have been displaced eventually by an

absolute monopoly resulting from the giving way of the weaker lines.

* * * * *

[1361] The conference agreements adopted by the steamship lines engaged in trade between the United States and foreign countries are substantially the same as those in force in all the other principal maritime nations of the world. They are of various types, but ordinarily they contain the following features, or some of them:

1. An agreement as to sailings.
2. An agreement as to rates of freight.
3. A pooling agreement.
4. A system of deferred rebates to loyal shippers.

* * * * *

[1363] Competition in freight rates beyond a very limited point is detrimental to the interests of shippers, especially of small shippers. Competition has never established a reasonable rate nor maintained a stable rate. In every rate war the object of the competitors is to obtain the business of the large shippers. The rates offered to such shippers are directly or unconsciously discriminatory, and the business of the smaller shipper suffers. Rate wars tend to the monopolization of trade by the larger shippers. Unless the warring steamship factions come to some agreement the result is more or less of a monopoly on the part of the most powerful carrier engaged in the conflict.

* * * * *

[1369] The system of deferred rebates to loyal shippers has none of the evils of the secret rebate which was formerly employed by railroads. Rebates which exist in certain trades from distant countries to the United States are open and public. In the coffee trade from Brazil, for instance, circulars are printed

by the lines and widely distributed among shippers of coffee in the Brazilian ports, offering a discount or allowance on the freight to any merchant who will confine his shipments for a fixed period to the conference lines. Any merchant may obtain the benefit of this published allowance by complying with the terms of the circulars. Under this system large and small shippers are treated absolutely alike.

The alternative to the deferred-rebate system in trades where the return cargoes are insufficient to fill the ships required for the outward voyages is the long-term contract. It is universally recognized that one or the other of these methods of insuring a continued patronage of the regular lines is necessary to justify the operation of such lines. To the shippers the great advantage of the rebate system has been the maintenance of steady rates of freight free from any serious fluctuations. Under that system the merchant signs no agreement binding him for the future. He is only bound to the extent of his [1370] accrued rebate. Except for this measurable sacrifice he is a free agent and can always avail himself of any opposition that offers him advantages sufficient to compensate him for his loss of rebates and is also in a position to obtain from the conference lines the advantage of any fall in current freight rates during the period covered by the rebate agreement. Under a contract for the shipment of a fixed quantity, or for all shipments made within a fixed period of time, the merchant fetters his future action and is deprived of all opportunity to avail himself of lower rates which may be offered in or out of the conference during the period that would otherwise be covered by his agreement.

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[1373] The right to enter into conferences which regulate sailings, establish reasonable, stable, and uniform rates, and equalize profits and losses, through the medium of pooling, is essential to the successful and efficient conduct of the steamship business. We believe, also, that in certain trades, especially those not yet fully developed, the deferred rebate system is preferable to the alternative system of long-time contracts.

* * * * *

[1397] SUMMARY OF REPLIES RECEIVED BY THE COMMITTEE ON THE MERCHANT MARINE AND FISHERIES IN ANSWER TO ITS CIRCULAR LETTER OF FEBRUARY 18, 1913, RELATING TO THE ADVANTAGES AND DISADVANTAGES OF STEAMSHIP AGREEMENTS AND CONFERENCES.

[Prepared by S. S. Huebner, expert to the Committee]

Exclusive of the complaints presented by witnesses, or otherwise referred to in the hearings under House Resolution No. 587, the committee received, during its investigation, a very considerable number of communications from shippers covering a large variety of grievances. One of the most noticeable features of these communications was the almost universal insistence that the information and all names be held in the strictest confidence, the complainant being fearful of retaliation on the part of the one line, or group of lines, upon whose shipping facilities his business was absolutely dependent. Long before the hearings were concluded it was apparent to the committee that the shippers were very reluctant to express their views openly relative to the subject matter under investigation. At the conclusion of the hearings, therefore, and in view of

the contentions of the representatives of the conference lines engaged in the foreign trade, the committee decided, under promise of confidential treatment, to ascertain approximately the extent to which leading shippers indorsed the views of the conference lines' representatives. [1398] In this purpose the committee was encouraged by many of the leading steamship-line representatives of the country, who confidently asserted that steamship agreements and conferences were a benefit to both shipper and shipowner, and that a great majority of importers and exporters would express this view. Accordingly, the following letter was addressed to approximately 2,000 individuals and firms; this number including manufacturing firms exporting largely to foreign markets, as well as all the importing firms and exporting commission houses, forwarders, brokers, and managers enumerated in the 1912 issue of the American Exporters' Export Trade Directory, for the ports of New York, Boston, Philadelphia, Baltimore, New Orleans, San Francisco, Portland, Seattle, and Tacoma:

FEBRUARY 18, 1913.

DEAR SIRS: At the recent public hearings before the Committee on the Merchant Marine and Fisheries (conducted in pursuance of H. Res. 587) a large number of representatives of steamship lines engaged in the American foreign trade have frankly admitted the existence in this trade of written agreements or friendly understandings between the established lines operating in their respective trades for the fixing and maintenance of uniform rates, and not infrequently for the purpose of pooling their business or holding their traffic by means of a rebate system. Considered in its entirety, the testimony shows that, as regards nearly every foreign-trade area, all the established lines operating to and from American

ports are working in harmonious cooperation, either through written agreements, conference arrangements, or gentlemen's understandings.

Practically all these steamship representatives have asserted that such agreements or arrangements are a natural evolution, and are necessary for doing the business and giving to the shippers an ample tonnage and an efficient, frequent, and regular service at reasonable rates. Such agreements, they contend, are a protection to the shipper as well as the shipowner. To the shipper they insure desired stability of rates and the elimination of secret arrangements with competitors. To the shipowner they tend to give a dependable return on the investment, thus enabling the lines to provide new facilities for the development of the trade. Such agreements, it was also argued, furnished the means for taking care of the disabilities of the weaker lines, whereas unrestricted competition, based on the survival of the fittest, tends to restrict the development of the lines and in the end must result in monopoly.

Moreover, with reference to the practices of steamship lines, judged from the standpoint of the shipper, the representatives of the conference lines testified as follows:

(1) That the tonnage and facilities are ample.

(2) That the rates are reasonable.

(3) That the rates and service are such as not to operate prejudicially to our commerce as compared with foreign competitive markets.

(4) That shippers are treated alike, and that special privileges and advantages are not given to some and denied to others.

The foregoing constitutes a brief summary of the essential contentions of the representatives of the conference lines. It is now the purpose of the committee

to ascertain as far as possible the extent to which these contentions are indorsed by the patrons of the lines or to what extent exception is taken to the same. With this purpose in view, the committee respectfully requests you to make a frank statement of your views and experiences (with respect to the foregoing) in the several trades in which you are engaged, either as exporter or importer, with the distinct understanding that your communication will be considered confidential. Moreover, if you have in mind any suggestions which you feel the committee should take under advisement in formulating its recommendations to Congress for proposed legislation, I shall be pleased to have you state the same.

Very truly, yours,

J. W. ALEXANDER,
Chairman.

Two hundred and seventy-nine replies have been received thus far in response to the above-mentioned letter, the majority of the communications expressing in detail the reasons for the approval or disapproval of the contentions outlined in the committee's circular letter. Although a more general response to the committee's request [1399] would have proven more conclusive, the number of answers received is sufficiently large to warrant the belief that an analysis of the same will furnish a reasonably accurate view of the general position taken by the exporting and importing interests of this country as regards the advantages and disadvantages connected with steamship agreements and conferences. This, it is believed, is particularly true since the majority of the replies were furnished by large manufacturers and export commission houses whose business operations extend to many geographic divisions of our foreign trade, and whose many years of experience has given them the oppor-

tunity to compare conditions prevailing under both the competitive and noncompetitive system in the shipping business.

* * * * *

It should be stated that of the 279 replies received, 52 referred to the fact that the firms represented by the writers do not come in direct contact with the steamship lines, and that the committee's circular letter was referred to their freight brokers, or forwarding agents, who attend to all their exporting business. Of the remaining 227 replies, 117 uphold the contentions advanced by the steamship interests. For the sake of brevity, the views expressed in these letters will be presented in classified form:

1. In 51 letters, or nearly one-half of the replies favorable to steamship agreements, the writers emphasized the fact that to them stability of rates and regular sailings overshadow in importance all other factors. Uniform rates and regular sailings, it is stated, enable them to conduct their business with better results than could be done under a system of throat-cutting competition (and such competition they generally regard as the inevitable result if steamship lines are not allowed to cooperate in some form or another), since as merchants and shippers they are not compelled to grope in the dark as to fluctuations in rates, and are relieved from the speculative risks, and the effects of underhanded discrimination which grow out of any competitive warfare between steamship lines serving the same ports.

* * * * *

[1401] 3. Approximately one-half of the total number of replies received by the committee in answer to its circular letter treat in some manner the subject of discrimination between shippers, having in mind mainly the treatment accorded to small as compared

with large shippers of freight. Many of the letters, favorable to steamship conferences and agreements, regard this phase of paramount importance and express the belief that, since it is difficult to prove the facts, although one's suspicions may be strong, the committee should give the subject special consideration.

* * * * *

It is also noteworthy that practically all the letters favorable to steamship agreements, which comment on this phase of the subject, take the view that to maintain equal treatment between small and large shippers it is absolutely necessary that steamship lines should be allowed to cooperate, and that the improvement toward greater fairness between shippers is due to the fact that the lines have cooperated. Competition in the steamship business is regarded in many of these letters as the demoralization rather than the life of trade; as the means of introducing uncertainty instead of certainty, and inefficiency instead of efficiency; and that, inevitably, while all shippers are placed ultimately at a disadvantage through competition, the small shipper fares much worse than his stronger competitor.

* * * * *

[1402] * * * Eight other letters desired the prohibition by legal enactment of all deferred rebate systems involving the American trade in any way, on the ground that such systems are an unnecessary adjunct to steamship conference arrangements, and constitute a pernicious practice obviously intended to prevent the free man's right of free trading.

* * * * *

[1403] Nearly all the letters recommending Government supervision of ocean carriers, suggested that the supervisory power be intrusted to some commission

like the Interstate Commerce Commission. With few exceptions, however, the writers were opposed to legislation which would require the steamship lines to file their rates with the Government and be obliged to charge the same until after a certain period of notice to make a change had been given. Such a policy was generally regarded as impossible, in view of the ever present competition of tramp ships in our international trade, unfair to the steamship lines which require protection against the inroads of such tramps, and particularly dangerous to American exporters, who, in competing with foreign markets, are often dependent upon an immediate and favorable freight rate quotation in order to close their contracts. Instead, it was suggested generally, the conference lines should file for approval full particulars of the agreements among themselves, as well as all contracts with shippers, rates and other information, so that the properly constituted authorities may judge the reasonableness of rates, and hear any complaint of discrimination between shippers, with the power to require the correction of abuses. With such Government supervision, steamship agreements, it is asserted, would constitute a fair means of practical cooperation tending to bring about stability and efficiency, and thus prove an all-round benefit to all parties concerned.

* * * * *

One hundred and ten of the replies received by the committee are distinctly hostile to steamship conferences as now conducted.

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[1404] 2. Forty-four of the letters charge discrimination in rates, and 27 discrimination in cargo space. Many of these communications, as in the case of the letters favorable to steamship agreements, frankly

state that as long as the freight rates charged by the steamship companies are the same for all shippers, the size of the rate is not so material, because it is merely added to the price of the goods. But that equal treatment in rates and space accommodations generally exist is doubted, although many assert their inability to furnish the proof in this respect. The letters clearly indicate a strong current of suspicion among the shippers that certain large manufacturing firms and commission houses are receiving special rates and accommodations which are gradually undermining their ability to compete on equal terms. Moreover, one-half of the letters charging discrimination are opposed to the making of contracts with shippers by steamship companies in which the rate is based on the quantity contracted for. Such contracts are regarded as a favorite means of discrimination against the small shipper who is unable to furnish the required tonnage, and they recommend in many cases that this practice be prohibited by law. As showing the views which many shippers hold with reference to the fourth contention of the conference line representatives, as outlined in the circular letter, the following extracts from 11 of the letters are herewith reproduced:

* * * * *

[1405] The foreign lines in combination should not be entitled to force any shipper to sign contracts with them. They say these contracts are for good purposes, but that is a farce. The contract is simply to tie the merchant up and compel him to ship by them. These contracts should not be tolerated and the merchant should be free to ship by any line, without regard to forced contracts. This will appeal to the committee, we trust. A merchant may sign a contract, and then within a few weeks unexpected competition arises, and yet

he may be compelled for 12 months to suffer through being forced into a contract he did not wish to sign. It is also well known that certain large American interests, owing to their control of enormous amounts of freight and their moneyed power, practically own several of these alien lines and derive benefits which their competitors do not secure, and such a condition is prejudicial to the merchant and the competitor of such firms, and this condition should be examined into. If a shipper, for special reasons, desires to make a contract, and an arrangement is entered into covering six months or more, outside shippers should be granted the same rate, should they ship goods of a similar character during the pendency of the existing contract.

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Volume 3: Special Diplomatic and Consular Reports

[9] The following diplomatic and consular reports on the methods and practices of steamship lines engaged in the American foreign-carrying trade were prepared for the special use of the Committee on Merchant Marine and Fisheries at the request of its chairman, the Hon. Joshua W. Alexander. In response to this request the Department of State cooperated with the Committee by issuing, under date of April 17, 1912, a circular of instructions to the diplomatic and consular officers of the United States in foreign countries. * * * S. S. Huebner.

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[13] EUROPE

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[49] Report of Robert P. Skinner, Consul General at Hamburg, Germany

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[88] REPORT OF SOREN LISTOE, CONSUL GENERAL AT ROTTERDAM, NETHERLANDS.

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[90] * * * a leading shipping firm in this city, writes as follows:

* * * * *

The Holland-American Line has an agreement with the principal Belgian, English, Canadian, and German steamship companies, constituting the North Atlantic pool or steamship conference on the understanding of mutual support and uniform ocean freights; and their method under this agreement is to publish a tariff of freights from European to American ports on equal basis, whether payable at the ports of shipment or of destination, but they are granting special lower freights on same basis of payment to those contracting shippers or consignees who for the running year or season promise in writing, that they will ship all their goods, or will have these shipped, by the steamers of the conference lines. No rebates are allowed to anyone. Contracting firms will be at liberty to use nonconference steamers, when American consignees, paying the freight, wish them to do so, and in the latter case such shipments will not be deemed a deviation from the contract, and such shippers will continually enjoy for the time named the lower freights stipulated therein.

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[107] REPORT OF GABRIEL BIE RAVNDAL, COUNSEL GENERAL AT CONSTANTINOPLE, TURKEY.

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[113] EXHIBIT

[Extract from Levant Trade Review, Vol. I, No. 1, p. 34]

* * * This agreement provides that shippers of cotton from Egypt to ports of the United Kingdom and the Continent must in [114] turn agree with the steamship companies that, in consideration of a specific rate of 25 cents per hundredweight (112 pounds), cotton consigned to the United States shall be shipped via European ports by the vessels of the parties to the agreement, and shippers are obliged to sign a contract to that effect, which contract covers a period of two years, at the end of which time it is renewed.

Violation of the contract subjects the delinquent to the enforcement of a penalty which would prove embarrassing if not disastrous to his business, as the carrying companies may decline to handle any cotton whatever for the offending exporter, or may fix a rate on his consignments to Europe which would make shipments impracticable.

* * * * *

[151] ASIA

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[212] REPORT OF D. MILTON FIGART, VICE CONSUL GENERAL, SINGAPORE, STRAITS SETTLEMENTS.

* * * * *

[213] A standard list of freights is made applicable to all the lines, and on these rates two rebates of 5 per cent each are allowed to all shippers, the applications for which are sent in every six months and paid about six months after, so that the shipping companies always have in hand considerable money due to the shippers, which they confiscate if any shipper sends

goods by any lines outside the conference. This effectually prevents any tramp steamers coming into Singapore.

[p. 213]

* * * * *

As the department already knows, the Straits Settlements Government has for some time been investigating the conditions under which the conferences are maintained, which investigation resulted in the passing of the freight and steamship ordinance of 1910, legislating against the conferences. This ordinance, however, was later repealed in view of certain agreements made by the governor of the Straits Settlements with the conference heads.

* * * * *

[214] MINUTES OF A MEETING HELD AT THE COLONIAL OFFICE ON THE 25TH OF MAY, 1911, BETWEEN SIR JOHN ANDERSON, G. C. M. G., GOVERNOR OF THE STRAITS SETTLEMENTS, AND REPRESENTATIVES OF THE HOMEWARD JAVA AND STRAITS CONFERENCE AND THE NEW YORK STEAMER CONFERENCE

* * * * *

Mr. Holt said that he understood the meeting to be private and confidential, and that neither side would be committed unless an agreement were arrived at.

Sir John Anderson agreed, and proceeded to state the reasons for which the Government of the Straits Settlements had passed the freight and steamships ordinance, 1910.

* * * * *

[215] As to the question of a list of articles to be exempted from the rebate system, the conference representatives put forward an alternative proposal, viz, that at fixed periods, known beforehand, shippers should receive in full the rebates due on the freight

shipped up to the end of the period, and should then be free either to remain in the conference system or to leave it.

The conference representatives suggested that the period should be once in three years, while Sir John Anderson urged that it should be annual.

Some discussion took place on this point, but finally it was agreed that the rebates due on all cargo shipped up to the 31st of December, 1911, should be paid then, or as soon after as the accounting allows, and that thereafter, commencing from the 1st of January, 1912, triennial periods should be established, at the end of each of which the rebates due on cargo shipped up to the end of the period should be paid to shippers, who would then be free to leave or remain in the conference system. It was explained that during the first two years of each period the present "overlapping" system would continue, but that at the end all rebates due would be paid up.

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[217] SOUTH AMERICA

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[243] EDITOR'S NOTE.—In the outward trade from New York to Argentina an oral understanding exists (see testimony of Mr. Paul F Gerhard, pp. 240–242 of the hearings before the Committee on the Merchant Marine and Fisheries) between the Lamport & Holt Line, the Houston Line, the Prince Line, the Barber Line, and the American Rio Plata Line with reference to the fixing and maintenance of rates: * * * It is also a part of the understanding that merchants who contract with individual lines for the shipment of large quantities of materials or for shipments during a season or a year have the privilege of loading such parts of their shipments as they may desire to load

upon any steamer or steamers of any of the five lines which may be loading at the time the merchants wish to make the shipment, but subject to arrangement with the agent of the steamer, except contracts that are closed by authority of the respective agents for participation in the same.

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[302] REPORT OF ARTHUR GARRELS, CONSUL AT ALEXANDRIA, EGYPT.

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An arrangement exists between local cotton exporters and several British steamship lines, between Alexandria and Liverpool, whereby the former agree to confine their shipments to those lines, and the lines guarantee regular sailings with ample room and fixed rates for an entire year.

* * * * * *

Volume 4: Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade prepared under direction of the Chairman of the Committee by Sc S. Huebner including the Recommendations of the Committee

[1] PREFATORY NOTE.

The following report on "Steamship Agreements and Affiliations in the American Foreign and Domestic Trade" represents a summary of the data gathered by the Committee on The Merchant Marine and Fisheries in its investigation of steamship combinations under House Resolutions 425, introduced by Mr. Rufus Hardy of Texas, on February 24, 1912, and 587, introduced by Mr. J. W. Alexander of Missouri, Chairman of the Committee, on June 18, 1912. (Copies of these resolutions are found on pp. 8 and 9 of this report.) The investigation was begun in

pursuance of House Resolution 425, but it was later deemed expedient to broaden the scope of this resolution so as to extend the investigating powers of the Committee to every possible transportation agency (such as forwarding, dock, terminal and all other companies and firms) which might be connected in any way with foreign or domestic water carriers, or with the railroads, and a knowledge of which might be essential in ascertaining the full relationship between the navigation companies themselves, as well as between such companies and the railroads. Accordingly House Resolution 587 was substituted for House Resolution 425, but, with the exception noted, this resolution was identical with its predecessor. The Committee was also authorized by House Resolution 205, of the Sixty-third Congress, introduced by Chairman J. W. Alexander, to continue during the Sixty-third Congress the investigation begun during the Sixty-second Congress under the provisions of House Resolutions 425 and 587.

It should be stated that a joint resolution was originally introduced by Mr. Humphrey of Washington providing for a joint committee of the House and Senate to investigate foreign shipping rings. Mr. Hardy, of Texas, subsequently introduced a joint resolution extending the inquiry embraced in Mr. Humphrey's resolution to include our domestic shipping and the relations between American railroads and foreign and domestic shipping.

[2] On April 20, 1911, and January 30, 1912, Mr. Humphrey of Washington introduced House Joint Resolution 72 and House Resolution 399, respectively, and on January 18, 1912, Mr. Hardy, of Texas, introduced House Joint Resolution 217. These resolutions were substantially the same in their purpose as House Resolutions 425 and 587, except that House Joint

Resolutions 72 and 217 provided for a joint committee to undertake the investigation. Hearings were held by the Committee on Rules on House Joint Resolution 72, beginning December 18, 1912, with the result that the Committee on Rules decided to report a resolution directing the Committee on the Merchant Marine and Fisheries to make the investigation, and for this purpose, as already explained, House resolutions 425 and 587 were reported to the House and adopted.

METHODS OF PROCEDURE AND SOURCES OF DATA.

In view of the wide scope of the investigation, the same comprising the country's entire domestic and foreign trade by water, the Committee adopted the policy of gathering as much data as possible, in advance of the public hearings, by the issuance of detailed Schedules of Inquiries to water and rail carriers. This was done because the data thus obtained would not only greatly reduce the extent of the public hearings, but would enable the Committee to select witnesses to the greatest advantage and to emphasize in the hearings only those phases of the investigation concerning which further information was desired. The following outline will serve to indicate briefly the method of procedure followed by the Committee, and the chief sources of the data obtained.

(1) Three comprehensive Schedules of Inquiries, each prepared to meet fully the requirements of House Resolution 587 (and published on pp. 10, 13, and 14), were respectively directed by Chairman Alexander, (1) under date of August 21, 1912, to 562 domestic navigation companies engaged in the coastwise, lake and inland commerce of the United States; (2) under date of October 3, 1912, to practically all steamship lines engaged in this country's foreign

trade; and (3) under date of September 16, 1912, to all the leading railroads of the country. The managements of all the aforementioned navigation and railroad companies, it should be added, were requested to submit their answers to the inquiries under oath. Of the 562 domestic navigation companies referred to 470 complied with the Committee's request, and the [3] replies included practically all of the important regular lines and large bulk carriers. Similarly, of the 187 railroad companies or systems to which the Schedule of Inquiries was sent, 180 submitted their answers to the Committee. As was expected, the foreign steamship lines did not respond as readily as the domestic water and rail carriers; yet of the 208 lines to which the Schedule was sent 88 made full returns under oath, this number representing lines engaged in nearly every sphere of this country's foreign trade. Moreover, since nearly all the foreign steamship lines are organized in conferences or operate under agreements as regards their respective routes to and from the United States, it follows that the replies of one line would answer, from the standpoint of the Committee's requirements, for the entire group of conference lines. In fact, in a considerable number of instances, it appears that the Committee's request received joint action by a number of conference lines and that one line was delegated to submit answers for the entire group.

Considered in their entirety, the sworn replies of the domestic and foreign water carriers and the railroads proved a most valuable source of information, and a very considerable portion of this report is based upon the facts thus obtained. It may be added that, as the replies to the Committee's inquiries showed the existence of agreements or affiliations which required a more detailed explanation than that given, further

details were obtained by correspondence with the parties involved. The proper officials of all rate, tariff and traffic associations, both with reference to water and rail carriers, were also requested to furnish copies of the associations' constitutions and by-laws and any tariffs published, as well as an explanation of the associations' purposes.

(2) The Department of State cooperated with the Committee by issuing at the request of Chairman Alexander, under date of April 17, 1912, a circular of instructions, containing six interrogatories (reproduced on p. 16), to the diplomatic and consular representatives of the United States in foreign countries for the preparation of reports on those methods and practices of foreign steamship lines engaged in the American Foreign trade that were contemplated under the terms of the aforementioned resolutions. In response to this circular of instructions 94 reports, representing practically every country of any importance in the import and export trade of the United States, [4] were prepared for the special use of the Committee, and have been published in volume 3 of the Committee's Proceedings. In many instances the reports received by the Committee were accompanied by numerous exhibits—principally copies of laws, reports and freight tariffs—of such a voluminous character that their publication seemed impracticable, although they proved of the greatest usefulness to the Committee in its investigation.

(3) Under date of September 3, 1912, the Department of State also requested American diplomatic and consular representatives to procure for the Committee the current freight tariffs or rates of the steamship lines engaged in our foreign trade, as regards the voyage to American ports. This request also met with a very general response, and in many in-

stances the reports supplemented in important particulars the reports furnished in response to the State Department's circular of April 17, 1912.

(4) All boards of trade, chambers of commerce produce exchanges and other leading commercial and shipping organizations were invited by the Committee in August, 1912, to be heard at the Committee's hearings or to file with the Committee, under promise of confidential treatment if so desired, any complaints, suggestions or information coming within the scope of the resolution. A considerable number of these associations either filed written reports with the Committee, or requested to be given a hearing through a representative, relative to conditions coming within the purview of the resolutions authorizing the investigation.

(5) Much assistance was obtained through the cooperation of the Department of Justice, which gave the Committee access to the testimony and exhibits in the cases now pending against various foreign and domestic water carriers for alleged violation of the Sherman Anti-Trust Law. The publications of the Bureau of Corporations on "Transportation by water in the United States" and the decisions and files of the Interstate Commerce Commission proved to be valuable aids to the Committee. Moreover, much information was obtained from the "Report of the Royal Commission on Shipping Rings" and from the leading shipping journals. The New York Committee, appointed by the representatives of steamship lines maintaining established services from New York to foreign countries, also submitted a report to the Committee (published in vol. 2, pp. 1357–1375 of the Committee's Proceedings), which [5] presents a comprehensive statement of the reasons which lead to the formation of steamship agreements and conferences.

and the advantages resulting from such arrangements.

(6) Following the receipt of most of the replies to the Schedule of Inquiries addressed to the foreign and domestic water carriers and the railroads, as well as to American diplomatic and consular representatives, and after a general survey had been made of the data secured through all of the aforementioned sources of information, the Committee held public hearings with a view to making the investigation more complete. The chief purpose of these hearings was to ascertain certain facts which did not appear clearly from the information already obtained, and to give all shipping and steamship interests which so desired, an opportunity to present their grievances, suggestions for remedial legislation, or other contentions. These hearings extended from January 7 to March 3, 1913, and the evidence was published in the first two volumes of the Committee's Proceedings. In all 55 witnesses were heard, the same having been selected (1) with reference to their apparent ability, judging from their relations to various steamship lines, to explain the nature of the steamship agreements or affiliations existing in the several divisions of our foreign and domestic trade, and (2) with a view to having all the geographic trade zones properly represented. Thirty-two witnesses represented important steamship lines which had agreements or affiliations with other lines; while eight represented so-called independent lines, and appeared before the Committee to explain the difficulties which they encountered in meeting the practices of the so-called conference lines. Nearly all of the other witnesses appeared as representatives of freight bureaus, boards of trade, and other commercial associations. While numerous individual shippers voluntarily presented their grievances to the Committee,

under promise of confidential treatment, very few were willing (fearing retaliation) to testify openly against the steamship line or lines upon which they were dependent for the movement of their freight.

(7) At the conclusion of the hearings, and in view of the contentions of the conference line representatives and the reluctance of shippers to express their complaints openly for fear of retaliation, the Committee decided, under promise of confidential treatment, to ascertain approximately the extent to which leading shippers indorsed [6] the views of the conference line representatives. Accordingly, the Committee addressed a circular letter, under date of February 18, 1913, (for copy see p. 17) to approximately 2,000 individuals and firms, this number including manufacturing firms, exporting largely to foreign markets, as well as all export commission houses, forwarders, brokers and managers enumerated in the 1912 issue of the American Exporters' Export Trade Directory for the ports of New York, Boston, Philadelphia, Baltimore, New Orleans, San Francisco, Portland, Seattle and Tacoma. Nearly 300 replies were received in response to the above-mentioned letter, the majority of the communications expressing in detail the reasons for their approval or disapproval of steamship conferences and agreements. These replies have been classified and summarized in volume 2 (pp. 1397–1408) of the Committee's Proceedings. Although a more general response would have proven more conclusive, the replies received indicate the position taken by leading exporting and importing interests of this country regarding the advantages and disadvantages of steamship conferences as now conducted. This is particularly the case, since most of the replies came from large manufacturing and ex-

porting commission houses, whose business operations extend to many geographic divisions of our foreign trade, and whose many years of experience have given them the opportunity to compare conditions prevailing under both the competitive and noncompetitive systems in the shipping business.

(8) Although our diplomatic and consular representatives were instructed to report the extent to which the countries of their official residence grant subsidies, subventions, bounties or other similar advantages to steamship lines, the Committee did not particularly emphasize this phase of the investigation, partly because the subject was comprehensively covered in the Annual Report of the Commissioner of Navigation for the year 1909, and partly because the British Government recently issued a detailed summary on "Bounties and Subsidies in respect of Shipbuilding, Shipping and Navigation in Foreign Countries" (Cd. 6899, June 1913). The numerous reports on the subject submitted to the Committee by American diplomatic and consular representatives have, however, been published in volume 3 of the Committee's Proceedings and may there be found classified under the names of the various countries.

[7] PLAN AND PURPOSE OF THE REPORT.

The following pages represent the bringing together, in the form of a classified summary of all the essential facts obtained from all sources just enumerated. In view, however, of the constant changes occurring in the relations between at least some of the hundreds of steamship lines involved in the investigation, it should be noted that this report presents the facts as they existed at the close of the hearings and the re-

ceipt by the Committee of the answers to the Schedules of Inquiries addressed to the steamship lines, the railroads, and our diplomatic and consular representatives. While changes have no doubt taken place since the information was obtained, it is certain that the general situation has not materially changed.

It was considered advisable to divide this report into two parts, viz, Part I, dealing with "Steamship Agreements and Affiliations in the American Foreign Trade," and Part II, relating to "Steamship Agreements and Affiliations in the American Domestic Trade." Each part, in turn, has been divided and subdivided in accordance with the geographic trade zones of, and trade routes in, our foreign and domestic trade.

S. S. HUEBNER.

[91] CHAPTER III. AGREEMENTS IN THE AMERICAN-AFRICAN TRADE.

UNDERSTANDING BETWEEN THE LINES OPERATING TO SOUTH AND EAST AFRICA.

* * * * *

[96] (5) All contracts with shippers are made for the account of all the lines in the agreement, each carrying its proportion of the contract freight as it is tendered from time to time. The testimony before the committee shows that such contracts have been entered into with various large American corporations, such as the Standard Oil Co., the New York Lubricating Oil Co., the Union Carbide Sales Co., and the International Harvester Co. Using the contract between the New York Lubricating Oil Co. and R. P. Houston & Co. for illustrative purposes (Mr. Halm advised the committee that the terms and

conditions of this contract are exactly the same as in the contract with the Standard Oil Co.), it appears that the oil company contracts with R. P. Houston & Co., as agent for all the South African lines, for freight room for all shipments to Cape Town, Mossel Bay, Algoa Bay, East London, Port Natal, and Delagoa Bay during the next two years from date at the freight rates specified in the contract. At the expiration of the two-year period, the contract is to continue indefinitely, subject to termination at any time thereafter by a nine months' notice in writing by either party to the contract. R. P. Houston & Co., on behalf of the lines, agrees to furnish at least one steamer per month for all the ports mentioned, except Mossel Bay, during the term of the contract, and the oil company agrees to announce the quantity of cargo to be shipped in ample time to allow for the proper supply of tonnage. All shipments must be [97] made in steamers named by R. P. Houston & Co., and it is agreed that—

> should the lines mentioned make a contract during the period of this contract for the transportation of similar articles to those mentioned in this contract at rates lower than those mentioned above, the New York Lubricating Oil Co. shall be given the benefit of such reductions on the same goods by the said steamer or steamers that carry the goods at the reduced rates.

It should be added that in the case of large shipments, such as the Standard Oil Co., advance notice of the quantity of cargo to be shipped during the next 30 or 45 days must be given, owing to the fact that the amount of their cargo is so large that no one line can satisfactorily carry the same unless such previous notice is given.

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[109] CHAPTER V. AGREEMENTS IN THE AMERICAN-ASIATIC TRADE.

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AGREEMENTS GOVERNING THE EASTBOUND AND WESTBOUND TRADE BETWEEN THE AMERICAN ATLANTIC SEABOARD AND THE FAR EAST VIA SUEZ.

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[114] * * * It is the declared purpose of the Eastward Agreement to "equitably divide all bookings" and to this end all contracts must be taken for joint account.

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[116] All the lines in the Conference have agreed to quote the same rates to all shippers. None of the contracts with shippers, most of which are joint contracts, it was testified (vol. 1, p. 390) give special rates or rebates to some shippers which are denied to others. Although the contract rates are generally less than those specified in the regular tariff, the lines pursue a policy of giving the small shipper the same contract rates as the large shippers, and are willing at all times to contract with all shippers on the same terms. (Vol. 1, pp. 390 and 391.)

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[117] In addition to pooling, however, a deferred rebate system exists in the westbound trade (no deferred rebates exist in the trade eastbound) from all the ports of the Far East to the United States.

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[137] * * * In fact, the Committee has received fewer complaints from shippers in the Oriental trade than from those engaged in any of the other leading foreign markets. * * * Most of the above-mentioned firms voice the general conclusion that

the organization of steamship interests into well-organized units for the conduct of the trade has produced much better results for exporters and importers than existed prior to the adoption of conference arrangements. Merchants, it is stated repeatedly, are not obliged to face conditions of absolute uncertainty as regards rates and shipping opportunities, and all are thus placed upon the same basis in their estimates on contracts.

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[153] CHAPTER VI. AGREEMENTS IN THE TRADE BETWEEN THE UNITED STATES AND SOUTH AMERICA.

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[164] AGREEMENTS IN THE AMERICAN-BRAZILIAN TRADE.

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[160] *Contracts with shippers.*—Freight contracts which are made for a specific sailing, or for a period not exceeding three months, are made by each line for its own steamers and on its own responsibility. But all contracts which extend beyond three months, or which involve a very large volume of freight, are usually joint contracts, i. e., made by one line on behalf of all the lines, each line assuming a one-third liability. Contracts involving large amounts of staples are also made jointly with a one-third liability for each line. (Vol. 1, pp. 155, 206.) It is only in connection with the joint contracts, the Committee is advised, that the lines distribute the traffic in New York.

A large number of joint contracts have been entered into by the several lines with such corporations as the Baldwin Locomotive Works, the Singer Sewing Machine Co., the United States Steel Corporation, the Barber Asphalt Paving Co., etc., and sample

copies have been submitted to the Committee. (See vol. I, pp. 247 and following.) Each line making the contract does so on behalf of all the lines, and the agreement covers the transportation of the shippers' *entire shipments* of merchandise from New York to the designated ports in Brazil at rates and conditions prescribed in the contract. In return for the shippers' entire freight, the steamship companies obligate themselves to provide space on receipt of ample notice of the shippers' requirements.

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[164] * * * Not only did the shippers wish not to lose the rebates that had accumulated, by patronizing the Pan American Mail Line (and as already explained, the giving of any freight to an opposition line meant not only the loss of rebates in the trade to the United States but also in the trade to Europe), but they were possessed with the fear that if they used the Pan American Mail Line's steamers the syndicate lines would, on one pretext or another, retaliate by refusing them accommodations on their subsequent shipments both in the American and European trade. (Vol. 1, p. 87.)

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[165] * * * Moreover, the representatives of the Pan American Mail Line charged that the opposition lines not only threatened shippers with the loss of their rebates in both the American and European trades, but let it be known that they would refuse to accept any longer the cargoes of disloyal shippers and would also start an opposition service with a view to running the American line out of the trade. Vol. 1, p. 19.)

[p. 165]

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[167] * * * Briefly summarized this statement shows that Arbuckle Bros. encountered the following difficulties:

(1) having refused to enter into the rebate agreement, the syndicate lines refused entirely to carry their coffee, even at full syndicate rates. Numerous shipments have been tendered to the syndicate lines, in accordance with the advertisements of the lines, but all have been declined on various pleas.

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[170] AGREEMENTS IN THE TRADE BETWEEN THE UNITED STATES AND THE RIVER PLATE.

Southbound trade.—

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* * * It is also a part of the understanding that merchants who contract with individual lines for the shipment of large quantities of materials or for shipments during a season or a year, have the privilege of loading all their shipments, as they may desire, upon any steamer or steamers of any of the five [171] lines which may be on the berth at the time the merchants wish to make the shipments, but subject to arrangement with the agent of the particular line which closes the contract.

* * * * *

[172] There are only a few joint contracts with shippers in this trade, all the testimony being to the effect that it is the general practice for each line to make its own contracts and to assume sole liability for the fulfillment of the same.[2] Numerous contracts

[2] Several witnesses expressed their belief that there is only one important joint contract, the same having been entered into between the Barber Line and the Standard Oil Co. The contract was concluded because the Standard Oil Co. insisted on having more frequent sailings than Barber & Co. could give,

with shippers were submitted to the Committee by several of the Argentine lines, and the contract made between R. P. Houston & Co. and the Hagemeyer Trading Co. on June 27, 1912, (vol. 1, p. 120) is illustrative of the individual contracts made by all the Argentine lines. The shipper according to this contract agrees to give the steamship line his entire shipments from New York to Montevideo, La Plata, Buenos Aires, Rosario and Bahia Blanca, for a designated period, usually a year, and the steamship line obligates itself to provide tonnage at definitely prescribed rates for all shipments offered, provided reasonable notice of intention to ship is given. The contract expressly provides that the entire shipments of the shipper can be sent only by the steamers of the contracting line, or "by steamers designated by the contracting line," thus implying that, while each line makes its own contracts with shippers, all shipments of [173] merchants contracting with any of the conference lines must go by conference steamers only, in case the contracting line can not carry the goods, because, as Mr. Daniels explained, the lines in designating steamers as per the terms of the contract would not go outside of their friendly conference arrangement. (Vol. 1, p. 226.) It is also stipulated in the contract that in case the steamship line reduces its rates to any other shipper during the period of the agreement, it will give the shipper the benefit of all such reductions during the period that the lower rates remain in force.

The policy of having each line in the conference make its own contracts, instead of having joint con-

and accordingly the contract specifies other lines, each line assumes a certain definite liability as to the quantity of cargo it will carry.

tracts, was adopted to avoid the disadvantages of a divided responsibility. "If the contract included all of the lines," according to Mr. William E. Halm, Manager of R. P. Houston & Co., (vol. 1, p. 277) "it would obligate each of those lines to provide tonnage, but there would be a divided responsibility which would not satisfy the shipper at all. In case of a very sudden rush of cargo or in case of delayed steamers, there would result an accumulation of much more cargo than all the prompt steamers could move immediately, and the shipper would be shifted from one line to the other. I would tell him to go and see the American & Rio Plata Line, and they would tell him to go and see the Barber Line in order to get his room. But in case one line makes the contract, that line is responsible to furnish the shipper that room; and that form of contract is considered by us and by the shippers as the one that carries with it the best fulfillment of the contract." Mr. Halm, however, testified that while there is nothing in the contracts of his line that implies liberty on the part of the merchant to ship by any of the other lines, as a matter of fact each contractor is allowed to ship by any of the other conference lines working in harmony with the Houston Line. (Vol. 1, p. 277.)

All of the witnesses before the Committee representing the Argentine lines testified that small shippers, if willing to contract, are offered the same rates as the big shippers and are allowed to enter into contracts with the lines on identically the same terms. (Vol. 1, p. 246.) Furthermore, in case large shippers have entered into contracts at rates below the regular tariff, small shippers are allowed to contract subsequently at the same rates for the balance of the year, it being the desire of the line to have all the con-

tracts expire at the same time. (Vol. 1, p. 246.). In fact, the representatives of the lines [174] have been a unit in testifying that they are anxious and always ready to make contracts with as many shippers as possible. On the one hand the steamship lines find a large number of contracts on their books highly advantageous in the establishment of a regular service, since in the case of large steamers it is impossible to wait until the boat is on the berth before soliciting cargo. On the other hand, nearly all the merchants of any importance in the trade want such contracts in order that they may contract for the future and know that when their goods arrive in New York there will be steamers on hand to convey the same. [172–174]

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[184] RELATIONS BETWEEN THE LINES OPERATING FROM NEW YORK TO THE WEST COAST OF SOUTH AMERICA; AND VICE VERSA, VIA THE STRAIGHTS OF MAGELLAN.

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[186] *Contracts with shippers in the southbound trade.*—Much of the freight from the United States is carried under informal contracts for firms which have large interests on the west coast of South America. Such firms are, as a rule, given a fixed rate per ton for a specified period on all their shipments in bulk. These large block shipments often consist of different kinds of material which are not [187] necessarily known to the steamship line beforehand, and the rate applies to the whole bulk of merchandise without regard to the rates which would be charged on particular articles if offered separately for shipment. It follows that the average contract rate on articles included in the large bulk consignment might

be lower than the rates applying to the same articles when sent by exporters who are unable to furnish large combination cargoes. (Vol. 1, p. 487.)

Furthermore, in at least one important instance, special rates are given to a large corporation. Mr. M. Bouvier testified that with the exception of the United States Steel Corporation, the "Merchants' Line" treats all shippers alike in the matter of rates at a given time. The United States Steel Corporation, however, furnishes a very large tonnage, and while there is no agreement for the exclusive handling of the freight, the "Merchants' Line" gives this corporation rates (which are in writing) about 15 per cent below the rates offered to other shippers. While the United States Steel Corporation has not bound itself to supply a definite amount of tonnage in consideration of the special rates, Mr. Bouvier explained that his line can obtain all the freight it wants from the corporation. (Vol. 1, pp. 490–492.)

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[225] THE PORTO RICAN TRADE*

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[236] *Contracts with shippers and discrimination in rates between shippers.*—In the absence of an amicable understanding between the lines in a given trade, the desire for self-protection causes each line, unless prevented from doing so by government regulation, to resort to secret and preferential arrangements with individual shippers in order to secure their freight. In this respect the Porto Rican trade offers an excellent illustration of the existence of special contracts with shippers and discrimination in rates.

Representatives of the Porto Rican lines have

*Footnote omitted.

frankly acknowledged that shippers in this trade, under present conditions, are not treated alike. Mr. F. D. Mooney testified that the New York & Porto Rico Steamship Co. has many special contracts with shippers in both the homeward and outward voyages, that different contracts quote different rates, but that no system of deferred rebates exists in the trade (vol. 1, p. 632; 637). He was frank in stating that, under present conditions, one shipper might be granted rates lower than another; that at a given time, and on the same vessel and with reference to the same commodity, a large shipper might get a more favorable rate than his smaller competitors; and that his line made a distinction between shippers on account of the quantity shipped (vol. 1, pp. 634, 635, 636).

In its circular letter to shippers, under date of July 12, 1911 (vol. 1, p. 395), the Insular Line gives the following lucid explanation of the effect which the rate war had in compelling it to change its [237] former policy of charging uniform rates to all shippers. The following is the statement:

> We feel that the trade with Porto Rico in order to flourish requires a weekly service at steady and reasonably remunerative rates rather than infrequent sailings at fluctuating tariffs and cut rates which can not be permanent. We feel also that the importers in Porto Rico will make no greater profit from their business with fluctuating tariffs and cut rates than under our former regular, reasonable, and steady rates, which were the same for every shipper, yet we feel that we, who have always quoted lower rates than any other steamship line in the field and who have quoted uniform rates to all shippers of the same kind of merchandise by the same steamer, can not allow our competitors to take credit to themselves for the present reductions in rates which

> were forced upon them by us. The policy of this company has been and will at all times continue to be based upon giving our customers the lowest rates to Porto Rico, so that in the near future shippers may expect to see as much as 70 per cent discount from the Porto Rico Line tariff rates.

Mr. Mooney testified that his line "makes its rates according to conditions and they naturally vary," and that it has special contracts with a great many shippers, among them being the American Tobacco Co., National Packing Co., Swift & Co., the Texas Co., etc. (See list in vol. 1, p. 636.) The form of the contract is the same in all cases, except where port conditions are different, or where different rates may be quoted (vol. 1, pp. 636, 637). The contract of May 23, 1912, with Swift & Co. (vol. 1, pp. 632–634), for example, provides that the shipper has the privilege of forwarding via steamers of other lines than those of the New York & Porto Rico Steamship Co. ten per cent of all their provision shipments between the United States and Porto Rico, but in consideration of the rates named it is understood that during the life of the agreement all their remaining provision cargo is to be shipped by the contracting line's vessels. It is further agreed that *if any general reduction* is made by the line in its present freight rates on commodities handled by the shipper, the latter are to have the *proportionate benefit* of such reduction during the period that the contract is in force.

When asked to furnish his line's contracts with shippers, Mr. Mooney requested that there be no disclosure of the rates charged (vol. 1, p. 636). Mr. Bull, likewise, requested that he be not asked to disclose his contract arrangements with shippers, since, as he states in reply to the Committee's Schedule of Inquiries "self-protection [238] makes it im-

perative that we withhold any information regarding this subject at this time for the reason that our competitors have informed us that they will follow up all the business we are doing, and as fast as our contracts expire will either oblige us to take the business for nothing or force us out. There is nothing we wish to withhold except so far as our competitors may secure the information to use against us." He testified that his line can only protect itself with long-term contracts, some for three years, and that in this way it is "getting a higher rate of freight to Porto Rico than either of its competitors on a great many things" (vol. 1, p. 413). [236-238]

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[281] CHAPTER X. SUMMARY,

METHODS OF CONTROL IN CONNECTION WITH SHIPPING CONFERENCES AND AGREEMENTS—ADVANTAGES AND DISADVANTAGES OF SUCH CONFERENCES AND AGREEMENTS—RECOMMENDATIONS FOR PROPOSED LEGISLATION.

METHODS OF CONTROL EXERCISED IN CONNECTION WITH STEAMSHIP CONFERENCES AND AGREEMENTS IN THE AMERICAN FOREIGN TRADE.

The foregoing chapters contain a description of 80 steamship agreements and conference arrangements, which, when considered collectively, show that as regards nearly every foreign trade route practically all the established lines operating to and from American ports work in harmonious cooperation, either through written or oral agreements, conference arrangements, or gentlemen's understandings. The few instances where two or more lines serve the same route and have denied the existence of written or oral agreements for the regulation of the trade, are exceptions and not the rule.

An examination of the numerous aforementioned agreements and conference arrangements shows that they differ greatly in their details, especially since most of them are adapted to meet the needs of the particular trades to which they apply, or the special requirements of the several lines which are parties to the arrangements. Aside from these differences of detail, however, all the agreements and arrangements show one unmistakable purpose, viz, the control of (1) competition between the lines which are parties to the agreement or conference, and (2) competition from lines which are outside of the conference. The methods (as revealed by the aforementioned agreements) which effect control of what would otherwise be unrestrained competition are many and may be briefly summarized and illustrated as follows:

[282] I. *The regulation of competition between the lines*, parties to the agreement or conference, with a view to maintaining rates and securing to each line a certain portion of the traffic. These purposes are accomplished today by any one of the following methods:

1. *Effecting an agreement or understanding with reference to the rates charged.*—In this regard the lines may enter into:

(a) *Fixed rate agreements.*—This method may be illustrated by the N. D. L. V. Freight Agreements,[1] the Baltic Pool Agreements,[2] the Mediterranean Freight Agreement of December 15, 1911,[3] and the agreements or understanding governing the lines operating from New York to Australia,[4] New York to South, East and West Africa,[5] New York to Asia via Suez and

[1] Ch. I, p. 28.
[2] Ch. II, pp. 72–74.
[3] Ch. II, p. 79.
[4] Ch. IV, p. 104.
[5] Ch. III, p. 98.

return; New York to most South American ports and return; and Asia to American Pacific Coast ports.[6] Generally speaking the rates are definitely prescribed in the agreement or in the tariffs agreed upon, and all changes in such rates must be made by mutual consent. Where a pooling arrangement exists, it is sometimes the understanding that while the companies agree not to accept freight at less than certain prescribed rates, each line is permitted on each sailing of a steamer to accept heavy freight, not exceeding a certain designated total, at less than the prescribed rate, but in case this is done the line must account for the same in the pool at the actual freight rate received for that quantity.

(b) *Minimum rate agreements.*—This method of regulating competition is used most extensively in the North Atlantic European passenger and freight business. Thus in the first and second class passenger business the primary purpose of the agreements, as explained in Chapter I, is to establish minimum rates for each steamer of the several lines, depending upon the type of vessel. The business, however, is not pooled, and each steamer may charge more than the agreed minimum, depending upon the facilities offered to passengers. In the North Atlantic steerage business, where a pooling system prevails, the lines are not permitted by the agreements to reduce rates below a certain minimum in order to obtain their stipulated share of the business, but instead the lines which are obtaining passengers in excess of the allotted amount must [283] advance their rates so that traffic will be diverted to the lines which are not securing their proper share of the business. Similarly, in the eastbound and

[6] Ch. V, p. 115.
[7] Ch. VI, pp. 153–188.
[8] Ch. V, pp. 130, 131.

westbound freight traffic between American North Atlantic ports and the United Kingdom, and in the eastbound trade from New York to Mediterranean ports, the lines are governed by minimum rate agreements. The lines meet in conference and notify each other of their minimum rates upon a large selected list of articles, the rates thus filed being subject to change only after an agreed period of notice, varying from 30 to 60 days. In other words, the lines agree not to take freight (certain bulk articles being excepted) below the agreed minimum rates, but any line can serve notice that at the end of the designated period it will change these rates. Usually these minimum rates are the actual rates, except when rates advance very rapidly and the lines are in a position to charge more than the minimum.

(c) *Differential rate agreements.*—Thus in the trade between New York and Venezuelan ports the Royal Dutch West India Mail Line adheres to the rates of the Red "D" Line, but owing to its indirect and slower service has the right, by virtue of an understanding, to charge rates which are 5 or 10 per cent under those charged by the Red "D" line (p. 176). Certain North Atlantic passenger agreements governing first and second class passenger traffic, as indicated in Chapter I, also allow certain steamers a special rate which will measure the different services.

(d) *In some instances one line will be sufficiently powerful to dominate the other lines* and, without effecting any definite understanding, secure the desired conditions in rates. In fact, such domination was found to exist in nearly every instance where two or more lines serve a given route and no agreement was admitted. Only a few illustrations need here be given. The three lines operating in the trade between New York and the west coasts of South America via

the Straits of Magellan have apparently avoided anything that resembles an agreement or gentleman's understanding; yet the dominant carrier, according to the testimony, determines the tariff of rates, and the smaller lines adopt these rates in full, or follow them as closely as possible (p. 186). In the trade to most of the eastern ports of Central America the United Fruit Co. holds such a dominant position (its steamers being so much larger and its service so much more regular and frequent) that the few small competitors are [284] allowed to operate without opposition and charge the same rates (pp. 191–194). Again no agreement seems to exist between the lines operating in the trade between the Pacific coast ports of the United States and the west coast of Central America and Mexico. The facts obtained by the Committee tend to show, however, that the Pacific Mail Steamship Co. is the dominant power in the trade and that the other lines adopt its rates and refrain from antagonizing its interests (pp. 196, 197). In all of these illustrations the dominant line is so powerful that for the small competitors to start a rate war would mean their speedy elimination. In this connection there are also a few instances where a nonconference line works in friendly cooperation with the conference lines as regards rates. The Norton Line, for example, is not a party to the agreement governing the New York-River Plate trade; yet the conference lines keep the Norton Line posted as to the rates they are charging although that line is under no obligation to maintain the same. But as already explained (p. 174), "the Norton Line has maintained the rates of the other lines and the relations between it and the five conference lines are just as cordial as they were when the line formerly belonged to the conference."

2. *Apportioning the traffic by allotting the ports of sailing.*—This method may be illustrated by the following examples: The N. D. L. V. agreement, which allots certain European ports to each of the four signatories thereto, and which stipulates that "vessels in the trade with the United States shall not call either outward or inward at any home or adjacent port from or to which the vessels of any of the four lines are already sailing" (p. 27); the agreement between the Hamburg-American Line and the North German Lloyd, whereby these lines reserve to each other, respectively, the ports of Hamburg and Bremen as regards sailings from all American ports north of Savannah (p. 71); the traffic arrangement between the Russian East Asiatic Line and the Holland-American Line with reference to Rotterdam, the first line expressing its intention to operate to Russian ports only, but that, when obliged to call at Rotterdam for extra cargo, it agrees to maintain the rates of the Holland-American Line (p. 69); the agreement of 1908 between the Royal Mail Steam Packet Co. and the Hamburg-American Line whereby the first company agrees not to extend its American service to Haïtian ports and Santa Marta (p. 214); and the agreement between the [285] Compañia Maritima Cubana and the New York and Cuba Mail Line (recently terminated) for a territorial division of the destination ports in Cuba as regards the trade to and from New York (pp. 205, 206).

3. *Apportioning the traffic by restricting the number of sailings on the part of each line.*—A typical example of this method is afforded by the agreement governing the lines which operate between New York and the Orient via Suez. Each of the lines is allotted a certain number of sailings, these being distributed as nearly as possible at regular intervals throughout

the year, and the order of taking the berth is mutually arranged between the lines. Additional sailings can be admitted only by the consent of two-thirds of the signatories, based on the respective number of sailings (p. 113). Similarly, in the agreements governing the American-Brazilian trade the Lamport and Holt Line is allowed 24 sailings from New York, the Prince Line 24, and the joint service of the two Hamburg-American lines 24, while from Brazil the Hamburg-American services are allotted 24 sailings to New York, the Prince Line 24 to New York and 12 to New Orleans, and the Lamport and Holt Line as many as may suit its convenience. The Hamburg-American lines, furthermore, agree to withdraw their service to New Orleans, sailings to that port to be maintained only by the steamers of the Lamport and Holt and Prince Lines (p. 155).

4. *Limiting the volume of freight which certain lines may carry.*—Very few such arrangements exist in the American foreign trade. The White Star Line (the most prominent indirect carrier between New York and Australia), for example, has an oral understanding with the three direct lines operating from New York to Australia whereby the measurement cargo carried by the White Star Line from New York via Liverpool for Australia shall not exceed one-fourth of the aggregate measurement cargo taken by all four lines. Otherwise the White Star Line is not a party to the pooling agreement into which the other three lines have entered, and is free to quote its own rates (pp. 105, 106).

5. *Pooling the freight money from all or a portion of the cargo,* the same to be divided in certain agreed proportions among the lines which are parties to the agreement. The pool is generally managed by some designated official on such a basis that, after provision

is made for certain payments to meet the cost of running the [286] steamers, the balance of freight money is divided among the lines in such a manner that each obtains in the apportionment the amount allotted to it by the terms of the agreement. In some cases (the steerage agreements [1] and the Baltic pool [2] serving as illustrations), each line is allotted a stipulated percentage of the total traffic, and at stated intervals an adjustment is made whereby the line or lines which have overcarried their allotment must pay to the lines which are short of their proportion a certain stipulated compensation. In other cases (Mediterranean Freight Agreement of 1911 [3] and the Calcutta-Pacific Conference Agreement [4]), the lines are divided into two groups, and each group of lines is allotted, say 50 per cent of the total freight of all the lines, as in the first case, or one-third for the Calcutta lines and two-thirds for the Pacific lines, as in the last instance. Sometimes the entire freight earnings are pooled; whereas in other cases (New York-West African trade [5]) the several lines each receive, say 25 per cent of the earnings and the balance is then equally divided between the signatories to the agreement.

6. *Agreements between conferences, or between a group of conference lines and a nonconference line, where several trade routes adjoin or intersect one another.*—Such agreements are illustrated by the N. D. L. V. passenger agreements with the Compagnie Generale Transatlantique and the American Line; known as Agreement "L"; [6] with the Compagnie

[1] Ch. I.
[2] Ch. II, pp. 71–75.
[3] Ch. II, p. 79.
[4] Ch. V, p. 143.
[5] Ch. III, p. 92.
[6] Ch. I, p. 28.

Generale Transatlantique, known as agreement "G";[7] with the Canadian Pacific Railway Co. known as agreement "J"[8] and with the Austro-Americana, known as agreement "X."[9] Similarly, as noted in Chapter I, the Mediterranean Conference Lines have effected agreements with the Austro-Americana, and the American, White Star and French Lines, relative to their Italian and Oriental steerage passenger traffic via their Channel services.

7. *Requiring the lines to deposit a stipulated sum as a guaranty of good faith and declaring such deposits forfeited on the part of any line*, if it renders any assistance, directly or indirectly, to a nonconference line, or itself starts a new service which will interfere with the trade covered by the conference. New lines may not be admitted, as a rule, except by unanimous consent; and sometimes the agreements also stipulate that the lines "agree to abstain from [287] attacking, or competing for, any trade in which any other of the signatories may at present be engaged."

H. *Meeting the competition of lines outside of the conference.*—While the conference lines regulate competition between themselves through one or more of the above-mentioned methods, and agree not to aid or encourage a nonconference line, nearly all the agreements which do not contain a deferred rebate system make no direct reference to the methods which should be adopted for meeting the competition of outside lines, this matter apparently being reserved entirely for conference action. In this respect the agreements frequently provide that the signatories must take joint action to defend their mutual interests in the event

[7] Ch. I, p. 29.
[8] Ch. I, p. 30.
[9] P. 38.

of competition from other lines. Three methods seem to have been adopted to accomplish this purpose, viz:

1. *Deferred rebate systems*, whereby shippers, who agree to employ exclusively the steamers of the conference lines in a given trade, are allowed a rebate of a certain percentage of their freight payments (usually 5 or 10 per cent), which rebate is computed for a designated period (usually every three, six, or twelve months), but which is not paid until after a certain number of months (usually six months) following the period for which it is computed, and only on the condition that during the entire time, including both the period for which the rebate was computed as well as the time of deferment, the shipper has given his *exclusive* support to the conference lines. Since the time of payment of the rebate follows the period for which it is computed, the shipper, if he desires to obtain the rebate, is under constant obligations to the conference lines, and is prevented from patronizing any other service since that act would mean the forfeiture of all accumulated rebates. Judging from the facts produced in the foregoing pages, this method has proved by far the most effective device for the control of a trade, and is being used principally in the long-distance trades (such as, for example, the westbound trade from the Orient* and most South American ports*) where the regular lines feel that they can assure to shippers a regular and efficient service only on condition of exclusive support. The system has proved especially effective where American importers are also importers in Europe and the same conference lines serve both the [288] American and European trade, and where (as in the coffee trade from Brazil to Europe and the United States*) the deferred rebate

*Footnotes omitted.

agreement stipulates that the payment of the rebates is dependent upon the shippers' exclusive use of the conference lines for all shipments destined to either the United States or Europe, thus making it impossible for an independent line to secure freight unless it stands in a position to protect the shipper in both his American and European shipments. Moreover, as has been repeatedly pointed out in this volume, shippers require, above all else, a regular service, and in this connection the testimony shows that by patronizing an outside line the shipper would not only forfeit his rebates but could be penalized by being denied accommodations for future shipments even at the full rates of freight. Such retaliation would leave the shipper unprotected since an independent line is not large enough to supply him with tonnage at all times. In other words, the conference lines, by rotating the sailings of their steamers, can give a regular and frequent service, whereas the independent line with its fewer steamers can only offer sailings at less frequent intervals.

With the exception of the rebates to Bermuda, Martinique and Guadeloupe* (where, however, the rebates are not deferred, but depend upon the size of the shipper's total shipments), the deferred rebate systems now in use are equally open to all shippers who agree to give exclusive patronage, and are granted without discrimination as regards the size of individual or total shipments. Moreover, nearly all the rebate systems apply only to the American import trade, only four instances having been found where such rebates are granted in the export traffic from American ports, viz in the New York-Bermuda, Martinique and Guadeloupe trades (which, as noted, are not strictly deferred),* in the New York-Colom-

*Footnotes omitted.

bian trade,* in the New York-Kingston (Jamaica) trade,* and in the trade from the United Kingdom to certain American Pacific coast ports.* With reference to the American export trade it seems that the lines are laboring under the assumption that deferred rebates are illegal; and in some cases where such rebates formerly existed they have been abandoned, and where their adoption has been taken under consideration, a decision was reached not to establish the same. In the import trade, on the contrary, the lines appear to go on the theory that this country [289] has no jurisdiction over the matter, and that such rebates may be freely granted if the arrangement is made abroad and if the rebates are paid at a foreign port. But in this connection it should be noted that the deferred rebate system, although applied only to the import traffic, is, nevertheless, a very effective device for the control of the trade, since to make the trade profitable an independent line must have cargo in both directions.

2. *The use of fighting ships; or collective competition against a single competing line.*—To what extent this practice prevails at present is difficult to ascertain, practically all of the steamship line representatives who testified before the Committee having denied the existence of the practice. But the facts obtained by the Committee show clearly that this method has been used in recent years. Thus, in the North Atlantic passenger traffic, the evidence presented in the suit against the Hamburg-American Line et al. shows that in about the year 1908 the conference lines authorized the appointment of a committee for the purpose of selecting fighting steamers to destroy the competition of nonconference lines. This committee, according to the evidence, would select suitable steamers from any

*Footnotes omitted.

of the conference lines to sail on the same days and between the same ports, the regular rates being reduced to a point sufficiently low to secure the traffic. As already stated in this volume (p. 46) "the evidence in the Government's suit shows that such opposition sailings were repeatedly instituted against certain independent lines. * * * Any surplus of passengers which were booked for the fighting steamer, but which could not be carried by the same, would be transferred to other conference line steamers at the reduced rates. The expenses and loss from the lower rates, resulting to any line whose vessels had been selected, were distributed over the members of the conference. It was thus a case of all the lines, united in conference, opposing every sailing of a single opposition line. By distributing the loss over the several members of the conference, each constituent line would suffer proportionately much less than the one line which was fighting the entire group, and which would inevitably soon exhaust its resources in the conflict with the combined power of the large lines with their superior speed and better third-class accommodations." Again, in the freight traffic, it appears that six leading German lines established a "fighting corporation," called the Syndikats-Rhederei, the shares of which were apportioned among [290] the various lines with reference to the tonnage of the companies. This fighting corporation was organized toward the close of 1905, and according to the report of Mr. Robert P. Skinner, American Consul General at Hamburg, "four comparatively small and inexpensive steamers were purchased, and these, with such others as may be chartered from time to time, are hired out to the six owners of the company to meet dangerous competition and to drive it away. The fighting ships handle chiefly bulk goods, leaving merchandise which requires prompt transportation to the care of the parent company, which maintains its

nominal rates as far as possible, the stress of competition being borne by the fighting ships principally. In times of peace the fighting ships engage in regular trade on time charters. As this corporation is not one for profit primarily, the investment in reality, is a new sort of insurance." (Vol. 3, pp. 53–54.) Mr. W. G. Sickel, Vice-Director in charge of the Hamburg-American Line, testified before the Committee that "it is a well-known fact that the Syndikats-Rhederi does exist," and that he believed that its purpose is as stated above. (Vol. 2, p. 826.)

3. *Contracts with shippers which may be classified as:*

(*a*) *Joint contracts made by the conference as a whole.*—Such contracts are made for the account of all the lines in the agreement, each carrying its proportion of the contract freight as tendered from time to time. The contracting lines agree to furnish steamers at regular intervals and the shipper agrees to confine all shipments to conference steamers, and to announce the quantity of cargo to be shipped in ample time to allow for the proper supply of tonnage. The rates on such contracts are less than those specified in the regular tariff, but the lines generally pursue a policy of giving the small shipper the same contract rates as the large shippers, i. e., are willing at all times to contract with all shippers on the same terms.

(*b*) *Contracts made by the individual members of the conference,* which are open to small and large shippers alike, irrespective of the size of the shipment. According to this type of contract (illustrated by the conference lines in the New York-River Plate trade*) each line makes its own contracts with shippers and assumes sole liability for the fulfillment of the same. The shipper agrees to give the steamship line his

*Footnote omitted.

entire shipments to certain designated [291] ports during a definite period, and the line obligates itself to provide tonnage at definitely prescribed rates for all shipments offered, provided reasonable notice of intention to ship is given. The contract expressly provides that the entire shipments of the shipper can only be sent by the steamers of the contracting line, or "by steamers designated by the contracting line," thus implying that while each line makes its own contracts with shippers, the line when obliged to designate some other line's steamer as per the terms of the contract, would not go outside of the conference. If the line reduces its rates to any other shipper during the period of the agreement it is usually provided that the shipper with whom the contract was made should be given the benefit of all such reductions during the period that the lower rates remain in force. While there is nothing in these contracts that implies liberty on the part of the merchant to ship by any other line than the one he is contracting with, as a matter of fact, the shipper, it was asserted by witnesses, is allowed to ship by any of the other conference lines working in harmony with the line which made the contract. In a number of cases conference lines make both joint and individual contracts with shippers. Thus, in the New York-Brazil trade freight contracts for a specific sailing, or for a period not exceeding three months, are made by each line for its own steamers and on its own responsibility; but all contracts which extend beyond three months, or which involve a very large volume of freight, are usually joint contracts, i. e. made by one line on behalf of all the lines, each line assuming one-third liability and the shipper having agreed, as previously stated, to confine his entire shipments of merchandise to the conference lines[*].

[*]Footnote omitted.

(c) *Contracts with large shippers either for all their freight or for certain important articles forming the main basis in a given trade, at lower rates than those charged on similar goods, if shipped in small quantities.*—In the trade from New York to the West Coast of South America, via the Strait of Magellan, the lines carry much of the freight under informal contracts for firms which have large interests on the West Coast of South America. These firms are given a fixed rate per ton for a specified period on all their shipments in bulk, the rate applying to the entire consignment of merchandise without regard to the rates which would be charged on particular articles if offered separately for shipment, with the [292] result that the average contract rate on articles included in the large bulk consignment might be lower than the rates applying to the same articles when sent by exporters who are unable to furnish large combination cargoes. The representative of one of these lines testified that the United States Steel Corporation, for example, was granted rates about 15 per cent below the rates granted to other shippers because of the very large tonnage offered (pp. 186, 187). Again, the trade between New York and Guadeloupe, Martinque, and Bermuda furnishes another illustration, the ultimate rate of freight in this trade being arranged on a sliding scale based upon the quantity shipped. Since the quantity can not be ascertained in advance, an adjustment is made at stated periods for the purpose of allowing the shipper a refund on the rates which he paid when the freight was offered, and the size of the refund depends upon the quantity shipped. The shipper agrees to send all of his freight by the contracting line, guaranteeing a minimum quantity, and the rebate represents the difference between the freight paid and the actual freight as computed on the basis

of the quantity shipped. The rebate, however, is paid only on the condition that the shipper has faithfully carried out all the terms of the agreement pertaining to the minimum quantity of freight guaranteed, the shipment of all freight by the line, etc. (pp. 219, 220).

4. *Agreements with various American railroads relative to the steamship service for certain American ports.*—Thirty-two such agreements were discussed in the Chapter on "Agreements between American Railroads and Foreign Steamship Lines,[1] and in most instances these agreements provide for an "exclusive" or "preferential" working arrangement between the ocean line and the railroad which are parties to the contract, as regards the use of docks; the furnishing of freight by either party to the other, with the understanding that, so far as it is within their power to control the same, the parties will deliver to each other the freight which has been offered to them for through shipment; cooperation between the parties in meeting competition from other carriers serving the same port; the regulation of rates for purposes of competition, via other ports; the prohibition of other traffic agreements in the trade by either party; and the general promise to mutually aid each other in the promotion and improvement of the export and [293] import traffic through the port to which the agreement applies. These agreements, as stated in Chapter IX, when considered in conjunction with the agreements and conference arrangements existing among the steamship lines themselves, enable the favored lines "to occupy a strongly entrenched position from a competitive point of view, as compared with independent water carriers which have no such steamship conference or railroad connections" (p. 258). In a con-

[1] Ch. IX, pp. 239–280.

siderable number of instances the provisions of these agreements have been altered so as to constitute a "preferential" alliance, instead of an "exclusive" one, but as previously stated (p. 240), "a careful reading of the modified contracts, with their many provisions for a 'preferential' alliance between the parties in the use of railroad terminals and the solicitation and exchange of freight, causes one to wonder whether the change from a condition of 'exclusiveness' to one of 'preference' means much in actual practical results, * * *. Judged from their wording most of the agreements have brought about a close preferential alliance between vast railway systems, controlling the traffic of large sections in the interior of the United States, and important conference steamship lines, which is bound to prove a powerful aid to the preferred water carrier as compared with any independent line not thus allied."

SECRECY OF AGREEMENTS AND PREVALENCE OF ORAL UNDERSTANDINGS.

Reference should here be made (1) to the tendency toward oral understandings, instead of written agreements, between the lines operating to and from ports of the United States, and (2) the care which has been exercised to prevent agreements and understandings from becoming public. Oral understandings were described by various witnesses as "safer" than written agreements, and the preceding chapters refer not only to many agreements which were of an oral nature from their inception but to several instances where written agreements were terminated and oral understandings substituted, the witnesses however admitting that the lines continue to follow the same rates and conditions which were previously observed under the written agreements. In fact, wit-

nesses repeatedly drew the distinction between formal written agreements and oral or "tacit" understandings.

[294] While not involving as strong a moral obligation as written agreements, the evidence shows that for all practical purposes oral arrangements are quite as effective. Judging from the manner in which the lines observe the same, the existing oral understandings give unmistakable evidence of the high order of integrity prevailing in modern business, and justify fully the phrase "gentlemen's agreements." Written agreements seem to have accomplished their purpose in many trades and are apparently no longer needed. The lines in some instances need not even meet in conference; they may avoid every appearance and every act which would seem to show the existence of an agreement or understanding; and yet operate in the same spirit of harmony that would prevail if a written agreement existed. There is still friendly rivalry in procuring business, but this business is secured at not less than certain understood rates. Again, in nearly all of the few trades where agreements or understandings have been denied by all the interested lines, a remarkable uniformity in rates seems to exist and not a trace of a rate war can be found. The situation has been explained to the Committee as one of "following the leader," the dominant carrier fixing the rates and the less important lines adopting those rates, they being allowed to exist in the trade without having an effective fight waged against them, as long as they conform to the rates and conditions established by the dominant carrier.

Where written agreements govern the rates and methods of the lines, the terms of the agreements have been guarded with the utmost secrecy. Whereas domestic lines, with few important exceptions, answered

the Committee's Schedule of Inquiries, the foreign lines, in the majority of instances, either ignored entirely the Committee's request for information or, under one pretext or another, declined to answer. Of the 208 foreign lines to whom Schedules of Inquiries were directed only 88 replied, and in some instances where the Inquiries were answered the lines gave only the merest outline of the agreements or understandings to which they were parties. American diplomatic and consular officers, who were instructed to furnish copies or information of such agreements as far as the same could be obtained abroad, in most cases, when applying to steamship line representatives for the same, met with a polite refusal. A considerable number of the lines objected to the Committee giving publicity to their agreements, either on the ground that a suit was pending, or [295] that other lines should not be made acquainted with their business methods. The testimony before the Committee also shows that in the majority of instances the agreements are only in the possession of the foreign principals of the lines, most American representatives of the lines having expressed a mere knowledge of their existence and an entire ignorance of their provisions.

ADVANTAGES OF SHIPPING CONFERENCES AND AGREEMENTS IN THE AMERICAN FOREIGN TRADE.[1]

Practically all steamship representatives who testified before the Committee, as well as a majority of

[1] The reader is referred to the "Summary of replies received by the Committee in answer to its circular letter of Feb. 18, 1913, relating to the advantages and disadvantages of steamship agreements and conferences," published in Vol. 2, pp. 1397-1408 of the Committee's proceedings. This summary represents the views of leading exporting and importing firms operating at our most important ports. Portions of this sum-

the leading American exporting and importing firms who expressed their views on the subject to the Committee, contended that shipping agreements, conference relations, or oral understandings which steamship lines have effected among themselves in nearly every branch of our foreign trade are a natural evolution and are necessary if shippers are at all times to enjoy ample tonnage and efficient, frequent, and regular service at reasonable rates. Such agreements, it is contended, are a protection to both shipper and shipowner. To the shipper they insure desired stability of rates and the elimination of secret arrangements with competitors. To the shipowner they tend to secure a dependable return on the investment, thus enabling the lines to provide new facilities for the development of the trade. Furthermore such agreements are held to furnish the means for taking care of the disabilities of the weaker lines, whereas unrestricted competition, based on the survival of the fittest, tends to restrict the development of the lines and in the end must result in monopoly. Briefly outlined, the advantages secured through agreements and cooperative understandings, as presented to the Committee, are the following:

I. *Improvement in service:*

1. Regularity of service, resulting in the following advantages:

(a) Opportunities to merchants for shipping are increased, resulting in a much greater increase in the volume of trade, [296] especially to new or remote

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mary are reproduced in this chapter. The reader is also referred to the report submitted to the Committee on the Merchant Marine and Fisheries by the Committee appointed by the representatives of steamship lines maintaining established services from New York to foreign countries, including Porto Rico and the Philippines, under date of Mar. 3, 1913. This Report is published in Vol. 2, pp. 1357–1374.

markets, than would be the case if goods could be supplied only at irregular intervals.

(b) Fixed dates of sailings at regular intervals enable shippers to work with smaller stocks than they otherwise could, thus reducing unnecessary risks, as well as storage charges.

(c) Makes unnecessary the engaging of cargo space considerably in advance, and shippers incur no penalty or other inconvenience if unable or unwilling to ship goods at the last moment.

(d) Merchants are enabled to make forward contracts for the delivery of goods at a definite date. This factor is important in connection with stability and uniformity of rates. In view of both factors merchants can make contracts for forward delivery at a definite date and price, including cost, freight, and insurance. Such contracts are of vital importance in the trade of today, which is largely conducted in large quantities and on the basis of orders placed months ahead and calculated on a small margin of profit.

(e) Without regularity of service in the long-distance voyages, or in the new and undeveloped services, American merchants and manufacturers would be operating at a great disadvantage as compared with European merchants, who now have the benefit of a more highly developed service from European ports to foreign markets.

(f) A better distribution of sailings is secured. Under unrestricted competition a number of vessels may sail from the same port within a day or week, resulting in no sailings from that port for a considerable period thereafter. Under a system of cooperation, however, both the time and ports of sailings are agreed upon, thus "avoiding the waste involved in several ships calling at ports which require only

one and giving an excess tonnage on one date and a corresponding lack of tonnage at other times."

(g) A large portion of American exports coming from the inferior, it follows that, with regular sailings, goods arriving late and missing one steamer may be dispatched by the next steamer of another line, thus causing only a short period of waiting, with the result that unnecessary port charges are avoided, the accumulation of goods is prevented, and the loading and delivery of cargo is facilitated.

[207] *2. Greater security is given to capital invested in the steamship business* and because of this greater security shipowners are enabled to supply an adequate number of vessels of a higher class and greater speed than the ordinary tramp. Moreover, conditions surrounding most trades are dissimilar as regard the depth of water at the ports, the nature of the cargo offered, and the quantity of freight moving during certain seasons. By giving vessel owners a dependable return on the investment they are enabled to provide new facilities for the development of the trade and to adequately adapt the sailings, speed, and equipment to the particular trade. To many merchants the adaptability of the service to the requirements of the trade is highly essential, because of the nature of their exports and imports. The benefits claimed for this advantage are the following:

(a) Cargo is delivered in better order and with greater dispatch and regularity.

(b) Insurance premiums on cargo are reduced; and the rate of insurance may be counted upon as more uniform and stable, thus again favoring merchants in making contracts for the forward delivery of goods.

(c) Loss of interest on the cargo while in transit is reduced.

(d) Shippers are relieved of anxiety as to the class of vessel by which their freight will be shipped.

II. *Stability of rates over long periods of time:*

1. Removes the inconvenience which would exist if merchants and shippers were obliged to quote different propositions on nearly every consignment, thus eliminating what was formerly an undesirable speculative risk under the open competitive system. A uniform selling price in foreign markets is considered highly essential by merchants. Moreover, conference lines seek to give reasonable notice of alteration in rates, and when increasing their rates shippers are allowed to declare outstanding contracts at the lower rate.

2. Reduces the complaints from buyers abroad. American exporters assert that during periods of rate competition complaints from foreign buyers are numerous if sales to them do not happen to be on the lowest basis of cost and freight, while if there is uniformity in rates, even though these rates be on a higher level, it is seldom that foreign consignees make complaints.

[298] 3. Enables shippers and merchants to calculate laid-down costs and sell goods for delivery in the future. American exporters assert that such contracts for future delivery are today a necessity, and in this respect nothing is regarded so detrimental to the export trade as uncertainty regarding sailings and violent fluctuations in freight rates. Fixed rates under a system of cooperation, on the contrary, make possible the contracting for space for months, for a year, or even longer in advance, if desired. Such facilities are enjoyed by foreign exporters to competitive markets, and it is essential that American shippers should be placed on an equally favorable basis. Prominent exporting firms have again and

again asserted to the Committee that they have experienced various rate wars during the past 10 to 15 years and are convinced that the present condition of fixed rates and regular sailing opportunities places all merchants upon the same basis as regards their estimates on contracts and produces much better results for the exporter and manufacturer than could be possible under the old order of things.

4. During periods of rate cutting buyers abroad generally pursue a policy of buying from hand to mouth instead of placing large orders for shipments ahead, because they never know what the goods will cost them by the time the same are received. If they foresee serious fluctuations in rates during the one or more months which are required to dispose of large lots of merchandise, they prefer to buy small lots, even at a greater cost, in order to have a chance to meet their competitors.

5. During periods of rate cutting steamship owners are reluctant to make forward contracts for the carriage of freight because of unwillingness to sell cargo space for the future at a loss.

6. While competition in rates between conference lines ceases, competition in facilities continues. Although the conference system largely results in placing rates outside the influence of competition, by pursuing a policy of charging "what the traffic will bear," these rates must ultimately be reasonable for the following reasons:

(a) It is to the interest of the lines not to charge rates detrimental to the development of traffic. Shipowners depend for success on the good will of shippers, and to build up business must establish rates which will enable their American clients to compete successfully with foreign merchants engaged in the same trade.

[299] (b) Shippers are not placed at the mercy of the conference lines, because in nearly all the important branches of the American foreign trade there is competition from regular lines serving European merchants to the same ports. The lines serving American merchants must meet the rates of the regular lines trading to the same ports from foreign countries. In other words, world conditions govern ocean rates to and from the United States.

(c) If the rates of the regular lines, to quote the New York Committee, "should exceed or even approximate the chartered rate for tramp steamers, large shippers immediately protect themselves by the employment of tramps for the transportation of their shipments. Small individual shippers who can not accumulate merchandise in quantities sufficient to justify the charter of tramp steamers are at such times served by charter brokers, who are always ready, when rates by the regular lines advance to such a point that a profit can be made by charter, to lay chartered ships on the berth, themselves accumulating the shipments of numbers of small merchants, who by this means can always protect themselves against oppression." (Vol. 2, p. 1363.)

Despite the great increase in ocean rates in recent years the great majority of leading exporting and importing houses which have expressed their views on the subject to the Committee consider the present rates charged by the steamship lines as fairly reasonable when compared with charter rates prevailing the world over, and taking into consideration the capital invested, the increased cost of operation, the better character and greater speed of the vessels, the greater regularity of sailings, the maintenance of depreciation and sinking funds, the facilities of the ports of call, and the frequent absence of return cargo. While

many of the firms express a desire for a lower level of rates than exists today, provided they are uniform, they frankly admit that the present high rates, as long as they are steady over considerable periods of time and equally applicable to all without rebates or other special favors, do not militate against them nearly so much as would a lower level of rates if the same was a fluctuating one and was accompanied by irregularity in sailings. Moreover, the large increase in the number of steamers and in their size during the past 15 years in nearly all divisions of our foreign trade is pointed to as showing the desire of the lines to keep pace [309] with the growth of the country's export trade. It was also the general assertion that the regular lines give shippers advantages as contrasted with 'tramp' steamers. Not only are their rates uniform and their sailings reasonably regular, but their steamers are faster and their service better, and in the main these advantages overbalance the increase in rates.

III. *Uniform freight rates secured to all merchants.*—Uniform rates protect the small against the large shippers, and relieve all shippers from the effects of underhanded discrimination. Under open competition powerful shippers, or combinations of shippers, can obtain preferential rates, while under a system of cooperation it is not to the interest of the conference to give special terms to powerful clients. Rate wars are detrimental to the interests of small shippers because the object in every rate war is to obtain the freight of large shippers by offering special rates. The inevitable result of rate wars is a gradual monopolization of the trade in given commodities by the more powerful shippers.

Almost without exception, the testimony before the Committee of conference line representatives shows

that it is the purpose of their lines to charge uniform rates and to extend equal opportunities to all shippers. Practically all shippers, also, who in their statements to the Committee were favorable to agreements and conferences, took the view that to maintain equal treatment toward small and large shippers it is absolutely necessary that steamship lines should be allowed to cooperate, and that the improvement toward greater fairness between shippers is due to the fact that the lines have cooperated. Competition in the steamship business was regarded by them as the demoralization rather than the life of trade; as the means of introducing uncertainty instead of certainty, and inefficiency instead of efficiency; and that, inevitably, while all shippers are placed ultimately at a disadvantage through open competition, the small shipper fares much worse than his stronger competitor.

IV. *Prevent the elimination of weaker lines in the various trades.*—Unrestricted competition, based on the survival of the fittest, tends to restrict the development of the lines and in the end results in monopoly. Just as rate wars result in the monopolization of trade by the larger shippers, so also do they result in the monopolization of the carrying trade by one or a few of the most powerful carriers. [301] This is especially true in the long-voyage trade where pooling becomes desirable. Here equal rates can not be charged by all the lines in a given trade unless all are equal in speed and equipment. High-class freight, paying the most remunerative rates, would go to the best ships, while the least remunerative cargo would be shipped by the inferior boats. As reported by the New York Committee of steamship representatives: "By means of pooling the weaker line is compensated for its failure to obtain a fair share of the more re-

munerative goods and by living alongside the strong line adds to the total of the shipping facilities which the trade may reasonably require." (Vol. 2, p. 1368.)

In addition to the combinations by agreement there are numerous instances of consolidations among steamship lines by actual amalgamation or through stock control of subsidiaries. (The most notable examples of such consolidations are the International Mercantile Marine Co., the Royal Mail Steam Packet Co., the Hamburg-American Lines, and Furness, Withy & Co.) This movement toward actual consolidation by ownership, various witnesses have emphasized, would have taken place more rapidly and on a much larger scale if the making of steamship agreements and conferences had been impossible. In the absence of cooperation through written or oral agreements, according to these witnesses, only two alternatives present themselves, viz, consolidation by actual ownership or the elimination of the weaker lines through cut-throat competition.

V. *Maintenance of rates from the United States to foreign markets on a parity with those from other countries*, thus enabling American merchants to compete successfully with foreign merchants. It has been the contention of all the conference line representatives who have appeared before the Committee that their lines make every effort to keep American rates to foreign markets on a parity with European rates. The Committee has received only 27 complaints from exporting interests charging that American and European rates to the same destination are not kept on a parity to the detriment of their business; and it should be noted that less than half of these complaints present any definite date tending to confirm the complainant's charge. A majority of the complaints are general in character and merely call attention to the

desirability of having some properly constituted authority [302] investigate this subject from time to time. In answer to these charges the New York Committee of steamship line representatives maintains that—"while occasional differences arise, as a rule shippers are not charged higher rates from this country than shippers in Europe are called upon to pay on the same commodity. In this respect the lines running from ports of the United States are at a decided disadvantage compared with the European services, because the classes of cargo offered from American ports are of lower grade than those received by the European lines. A ship sailing from Europe will obtain better freight earnings because it carries a larger percentage of high-class cargo, while the expenses incurred in United States ports are always considerably higher than those of a vessel loaded at European ports. Besides, many of the lines running from this country to foreign ports, unlike the European lines, obtain no return cargoes, and are obliged to return to our ports either directly in ballast, or via some other loading port. These facts tend to increase the running expenses of the American services and would therefore justify a somewhat higher freight rate from American ports."

VI. *Reduction in the cost of service, eventually resulting in lower freight rates for a high standard of service.*

1. By eliminating wasteful competition among the lines, thus reducing the aggregate cost of service of all the lines.

2. By arranging the order of the sailings of the several lines at definite dates, and by regulating the sailings of the vessels of the various lines in such a manner as to prevent a number of vessels calling at ports which require only one at a given date.

VII. *Cost of service can be more economically distributed over the traffic so as to develop the trade.*

1. By reducing rates on articles where the rate would bear too heavily, and securing compensation on other items where the value and size justify the same.

2. By enabling the lines to view the trade "not only as it is, but as it may become." Certain ports may be placed on a reasonable footing in freight rates, although the present movement of freight would warrant much higher rates. This is especially true where pooling is practiced. "In connection with the operation of a steamship conference," as reported by the New York Committee, "pooling is nothing more than an equalization of expenses and earnings by the component members of a conference with the object that the conference shall furnish all the facilities that are demanded for the transportation both of profitable and unprofitable cargo and for the accommodation of the least profitable as well as the most profitable ports. Under its operations regularity of service is maintained, whether full cargoes are offered or not, whether the cargoes offered at any particular time be [303] of a more or a less profitable kind, and whether the going rates as embodied in the tariff be profitable as compared with the general market value of tonnage or not; it enables the conferees to give service within the area of the conference operations at small or unimportant ports, often at a loss, which would have to be neglected unless such loss could be equalized by being brought into a division of the earnings with the other vessels which serve the more important ports. The conferees, in substance and effect, become partners for the purpose of supplying tonnage for the particular trade in which the pool operates, and they divide their earnings and losses in proportion to the capital represented by tonnage which is furnished to

supply the needs of the trade." (Vol. 2, pp. 1367–1368.)

3. By increasing the number of sailings to the smaller ports. On most routes there are many ports of destination which should be served, and no one owner could serve all except at great expense, such as extra steaming and port charges, and by greatly prolonging the voyage to the dissatisfaction of consignees. The natural tendency where all lines are competing would be for each owner, in order to compete in rates and speed, to avoid extra expenses and loss of time by not calling at the comparatively unimportant ports. Without pooling, it is asserted, the United States would have no direct communication today with many of the minor ports throughout the world whose aggregate trade with this country is very considerable. If the pooled lines, however, have agreed to compensate each other for the losses, these undesirable ports will be served as may be reasonably required.

4. By equalizing the earnings on large contracts over the members of a joint service. As expressed by the New York Committee, "our large manufacturers and exporters have extensive outstanding contracts for the supply of rails, locomotives, car material, bridge work, oil, etc., to various ports. No one service alone could possibly handle such products. Shippers are often obliged at stated periods to make large shipments of a kind of material which would be quite unsuitable for a steamer, such as rails, on which the earnings would be much below those of succeeding steamers which would carry other portions of construction material covered by the same contract, the rates for which would be far more remunerative. Only a joint service which could equalize the earnings under the whole contract would carry the materials

covered by these large contracts without charging freight rates so prohibitive as to deprive the American manufacturer of the opportunity of securing the contracts in competition with foreign manufacturers. So the conference lines are able to maintain their schedules and provide for the export trade even at a loss to the individual ship." (Vol. 2, pp. 1368-1369.)

[304] DISADVANTAGES OF SHIPPING CONFERENCES AND AGREEMENTS, AS NOW CONDUCTED.

1. *The monopolistic nature of such conferences and agreements.*—Nearly all the objections advanced against steamship agreements relate to the limited monopoly, at least, which the conference lines are able to exercise over the trade in their respective areas. Briefly outlined the objections advanced under this heading are the following:

1. All monopolies are liable to abuse, and in our foreign carrying trade the monopoly obtained by the conference lines has not been subjected to any legal control. While carriers by land are supervised and must conform to statutory requirements in the matter of rates and treatment of shippers, steamship companies, through private arrangements, have secured for themselves monopolistic powers as effective in many instances as though they were statutory. Even granting the advantages claimed for steamship conferences and agreements, all may be withdrawn in the absence of supervisory control without the shippers having any redress or protection. The lines are under no legal obligation to continue these advantages. They exercise their powers as private combinations and are apt to abuse the same unless brought under effective governmental control.

2. The primary object of such conferences and agreements is to prevent new lines from being or-

ganized in a trade and to crush existing lines which refuse to comply with the conditions prescribed by the combination, or which, for other reasons, are not acceptable as members of the conference. The methods which have been adopted from time to time to eliminate competition show the futility of a weak line attempting to enter a trade in opposition to the combined power of the established lines when united by agreement. By resorting to the use of the "fighting ship," or to unlimited rate cutting, the conference lines soon exhaust the resources of their antagonists. By distributing the loss resulting from the rate war over the several members of the conference, each constituent line suffers proportionately a much smaller loss than the one line which is fighting the entire group. Moreover, the federated lines can conduct the competitive struggle with the comfortable assurance that, following the retirement of the competing line, they are in a position to reimburse themselves through an increase in rates. To allow conferences, therefore, generally means giving the trade to the lines now enjoying it. Only a [305] powerful line can hope to fight its way into the trade, and with the inevitable result, if successful, that it will join the combination or be allowed to exist by virtue of some rate understanding.

3. Conference Lines, it was asserted to the Committee, are enabled to arrange rates arbitrarily, both with reference to the general level and particular commodities; and the rates now charged were considered excessive[1] when compared with rates (1) charged by

[1] In answer to the summary (vol. 2, pp. 1403-1404) of the many complaints received by the Committee to the effect that the rates are unduly high and that the recent advances in rates have been so out of proportion to the increase in the cost of operation or the demand for additional tonnage as to show the absence of all competition in rates, the New York Committee of Conference Line Representatives makes an emphatic denial that

tramp or chartered steamers, or (2) previously charged by line steamers in the same trade, or (3) charged by lines in other trades, or (4) when considered in relation to the profits of the companies. This complaint, how-

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the recent rise in rates has been arbitrary, and has been effected by the combinations of lines with that purpose in view. This Committee maintains that "prior to 1911, freight rates had dropped to a figure previously unknown, entailing heavy losses on the regular lines, which had the choice of continuing their services or withdrawing from the business in which they had long been engaged. Competition among tramp owners produced a low level of rates, and as soon as the world's trade got ahead of the tonnage available, tramp steamers were put in a position where they could advance their rates beyond anything that had been experienced in recent years." It is also the contention of the Conference Line Representatives that in the enormous rise in ocean rates during recent years, the rates charged by the regular lines at no time rose to the level of the tramp freight market, and "were less than what the regular lines could have earned if they had withdrawn their steamers from their established services and chartered or placed them in other trades." As showing the enormous rise in the charter rates of tramp steamships, not working under any agreement or conference, the following represents in part the data furnished by the New York Committee:

Illustrations.	*Increase in the rate from.*
Petroleum in cases from New York to four ports in Australia.	17¢ per case, June 1908 to 35¢ in February, 1913.
Cotton from Savannah to Liverpool, Havre, and Bremen.	26/3 per net registered ton in Aug. 1908 to 58/9 in Nov. 1912.
Lumber from the Gulf to the River Plate.	95/- per standard in Nov. 1908, 125/- in Sept. 1911, and 192/6 in Nov. 1912.
Cotton from the Gulf to U. K. or Continent on net form charters.	8/6 per ton D. W. of steamer in Nov. 1908 to 25/- in Nov. 1912.
Sugar from Cuba to New York.	7¢ per 100 lbs. in Jan. 1908 to 17¢ in Nov. 1912.
Time charter from Baltimore to Glasgow.	3/3 per ton of total dead weight capacity in August, 1908 to 8/6 in August 1913.
Full cargoes of grain from Baltimore to Rotterdam.	1/3 per qr. of 480 lbs. in September 1908 to 3/6 in Jan. 1913.

ever, necessitates the difficult task of determining what constitutes a "reasonable rate," involving a study of—

(a) The factors that influence the rise and fall of the general level of rates.

(b) The differences in the nature of the service rendered by liners and tramps.

[306] (c) The character of the vessel and the expensiveness of operating the same.

(d) The stability of rates over a long period of time, chartered rates fluctuating much more violently.

(e) The different conditions surrounding each trade route as regards the nature of the service, the quantity of the cargo, and the opportunity for effecting combination cargoes.

(f) What constitutes a fair profit to the line, all factors considered.

4. Conference lines, through their monopolistic powers, so completely dominate the shippers with whom they deal that these shippers can not afford, for fear of retaliation, to place themselves in a position of active antagonism to the lines by openly giving particulars of their grievances. This condition is well illustrated by the frequency with which communications, addressed to the Committee, referred to the confidential nature of the information furnished. The various lines, constituting a conference, have the same interests and their organization is effective. Shippers, on the contrary, live far apart, and because of their different and frequently antagonistic interests can only combine for mutual protection with the greatest difficulty.

5. Conference lines, in view of the absence of competing lines, sometimes seem indifferent to the landing of freight in proper condition. A considerable number of shippers have complained to the Commit-

tee that they have experienced endless difficulty in collecting honest claims for damaged goods, loss of goods, or overcharges, and that the lines in some cases are extremely arbitrary in making settlements.

6. Conference lines are apt to become increasingly powerful within their respective areas, even to the extent of controlling the tramp traffic, until their limited monopoly of today will become practically unrestricted. It is argued that this tendency has been apparent in various trades and that, when the monopoly is complete, the lines will appropriate the advantages gained to themselves.

II. *In some conferences the lines have arbitrarily increased their rates without giving due notice to the trade*, thus causing heavy losses on contracts for future delivery, which were based on the freight rates prevailing at the time the contracts were made.

[307] III. *Steamship conferences and agreements as now conducted are in most instances secret*, and shippers have no means of knowing whether the conditions claimed by the lines for such conferences and agreements are true or not. Conference and rate agreements, and pooling arrangements, should be made with the full knowledge of some legally constituted authority in order (1) to safeguard the interests of shippers and (2) to make it possible for shippers to file complaints without fear of retaliation.

IV. *Some lines grant special rates to large shippers under contracts based on such large quantities of freight that small shippers can not possibly furnish an equal amount, thus discriminating between shippers and preventing competition.*

V. *Some of the conference lines do not observe the customary conference usages in respect to the equal treatment of shippers in rates and special accommodations.*

VI. *The policy of many conference lines not to publish their tariffs or classifications,* although such publication would prove a great convenience to shippers and would constitute a guarantee that rates were not altered or articles transferred from one class to another, for the benefit of favored shippers.

VII. *That deferred rebate systems are objectionable and should be prohibited for the following reasons:*

(1) By deferring the payment of the rebate until three or six months following the period to which the rebate applies ship owners effectively tie the merchants to a group of lines for successive periods. In this connection it is argued that the ordinary contract system does not place the shipper in the position of continual dependence that results from the deferred rebate system.

(2) That the system is unnecessary to secure excellence and regularity of service, a considerable number of conferences being operated today without this feature.

LEADING RECOMMENDATIONS OF WITNESSES FOR PROPOSED LEGISLATION

Government regulation of carriers engaged in the American foreign trade.—The consensus of opinion, as expressed in the testimony of witnesses and in the numerous communications received by the Committee from shippers, is overwhelmingly in favor of some form of [308] government regulation of steamship carriers engaged in this country's foreign trade. Nearly all the steamship line representatives, who appeared before the Committee, expressed themselves as not opposed to government supervision which is reasonable and which is limited to the requirements of

full publicity and approval of all agreements or arrangements which steamship lines may have entered into with other steamship lines, with shippers, or with other carriers and transportation agencies. On the other hand, the shippers who appeared as witnesses, or otherwise submitted recommendations for proposed legislation, were in the great majority of instances favorable to a comprehensive system of government supervision, sufficiently broad to embrace the regulation of rates without actually fixing them, the approval of contracts, agreements and arrangements, and the general supervision of all conditions of water transportation which vitally affect the interests of shippers. While few of the shippers who communicated with the Committee by letter (and the same may be said of witnesses) attempted to specify the details of their recommendations, they are almost a unit in stating that they are convinced of the desirability of having the Interstate Commerce Commission, or a similar commission, exercise a general supervisory power over foreign water carriers and enforce among the conference lines at all times the various contentions which they have claimed for themselves during the hearings before the Committee. It is noteworthy that only five of the many communications received by the Committee, which were unfavorable to steamship agreements and conferences as now conducted, display an attitude of hostility toward government regulation. In fact, many of the communications received from shippers make it clear that the writers regard the contentions of the conference line representatives as advantageous to shipper and shipowner if they are honestly and fairly carried out, but state that their experience has been to the effect that, once the combination of lines is established, it is apt to be used in an arbitrary and unfair way by favoring some large

corporation or friend to the detriment of other shippers. Such discriminations and arbitrary treatment, it is believed, can only be eliminated by the establishment of some legally constituted authority which is empowered to hear complaints and to order the discontinuance of abuses.

[309] *Impracticability of filing rates with the government and requiring a period of notice before changing the same.*—With few exceptions, steamship representatives and shippers, who testified before or communicated with the Committee, were opposed to legislation which would require the steamship lines engaged in our foreign trade to file their rates with the government and be obliged to change the same until after a certain period of notice to make a change has been given. Such a policy was generally regarded as impossible, in view of the ever present competition of tramp vessels in our international trade, unfair to the regular lines which require protection against the attacks of such tramp vessels, and particularly objectionable to American exporters, who in competing with foreign markets, are often dependent upon an immediate and favorable freight rate quotation in order to close their contracts. In support of this contention the following arguments were emphasized before the Committee:

(1) The nature of the steamship business is so essentially different from that of the railroads that any limitation upon the freedom of ocean carriers to change their freight rates promptly to fit the changing conditions of the freight market would prove injurious to shipowners, shippers and consignees. As pointed out by the New York Committee:

> Ocean freight rates vary not merely from month to month, but from day to day and from hour to hour, especially with reference to the

great staples which are traded in on the exchanges. The difference of a fraction of a cent in the freight rate may mean the loss of a contract to a merchant or manufacturer at an interior point in the United States who is competing with manufacturers and merchants in other countries. In the development of new countries the American manufacturer of steel cars, locomotives, car materials, bridge work, etc., is competing not only with merchants in this country but with Canada, Russia, Australia and Argentina. Unless the carriers are free to quote such merchants freight rates which will enable them to compete successfully with the business of the merchants of other countries the lines will suffer serious detriment. (Vol. 2, p. 1373.)

(2) World conditions govern ocean transportation. While steamship agreements and conferences admittedly limit competition among the parties to the agreement or the members of the conference, many bulk articles are carried by tramp vessels which operate wherever freight is offered and at constantly changing rates, and no law can with justice restrict the operations of the so-called regular lines and not at the same time be made applicable to the tramp.

[340] (3) The fixing of hard and fast rules in the naming of rates in ocean transportation is impracticable because the unit of transportation by water is the total capacity of the ship, and, unlike the practice in rail transportation, it is impossible to cut off any tonnage space when its use is found unnecessary. Since the ship must be considered a unit, any restraint upon the lines in the naming of their rates would seriously interfere with the economical and safe loading of the vessels and the proper combination of weight and measurement cargo. Numerous steamship representatives have testified to the effect that certain classes

of freight, such as grain, must frequently be secured on short notice and at greatly reduced rates in order to properly load the vessels to their marks.

(4) The position of steamship lines differs from that of railroads in that the vehicle of carriage has a charter value which must always be kept in mind. Moreover, railroads enjoy property rights acquired often at the expense of the state, operate by virtue of special privileges, and should therefore be held to the performance of the functions for which they were created. Steamship lines, on the other hand, are not tied like the railroads to a definite route of travel, i. e., vessels are not fixtures in any trade and are not limited in their operation to any fixed line. They have received no public aid or franchise, are essentially enterprises of a private nature, and are not bound to maintain a definitely prescribed service. The vessels may come and go by whatever route or in whatever direction they please and the only incentive to engage in any particular trade is to develop that trade to a point where the profit will justify the operation of a regular and continuous service. In view of these circumstances, it is argued, steamship lines can not be bound to an impossible proposition, and if the fixing of rates should result in the imposition of conditions which embarrass a particular trade, or render it less profitable, it is but natural that the vessels would be transferred to trades where commerce is unrestrained and yields the largest profit. It was the consensus of opinion of the leading steamship line representatives that any attempt to prescribe rates would cause a serious setback to our export trade; that no legislation could be enacted which could compel the lines to operate a stated number of vessels and a service of prescribed efficiency; and that unless the lines are allowed to transact

their business with the freedom believed neces- [
sary. American exporters might find themselves
the unhappy position, while allowed low and fa
able rates, of being unable to procure sufficient
toms for the exportation of their goods.

Some of the leading steamship line representat
took the view that tariffs and rates might be f
with some designated commission, and be public,
vided the lines be permitted to vary from these r
whenever necessary and without notice to, or
thority from, such governmental authority. Th
according to the testimony of Mr. P. A. S. Frank
vice president of the International Mercantile Ma
Co., "the only thing we feel could possibly be don
and I do not know whether the majority of the sh
ping trade agree with me—is the question of fi
the rates at some pla e in Washington for gene
supervision to which shippers could apply and
what rates are in force at the time and what ot
people are getting. We feel there is no other w
to conduct our business except by working toget
in the manner in which we are now working."

Mr. Franklin continued to state that rebating
other discrimination between shippers in any tr
should be prohibited absolutely, and in this con
tion justified the filing of rates in the following wor

> The object in filing the rates would be t
> there is the rate of that day. We would h
> to prove in the case of any difficulty that
> offered to a shipper that rate on that day, t
> everything was equal to all, and that there w
> an equal chance to everybody to ship at t
> time. We might get all the freight we wan
> today, and we might be out of the mar
> tomorrow. (Vol. 1, pp. 625-626.)

Publicity of agreements and arrangements.—T
steamship line representatives who testified before

Committee were almost a unit in their contention that cooperation among the lines through agreements relating to rates and methods of doing business are necessary for the economical and effeient handling of our foreign trade. In view of the almost universal existence of such agreements or understandings it was the general consensus of opinion that agreements should be permitted, and that, whenever entered into, all agreements and contracts between steamship lines, or between such lines and any shipper, railroad or other transportation agency, should be filed with the government for approval, or be subject to call by the government at any time, with the understanding that the same can be ordered canceled if any feature thereof should [312] be considered wrong or unfair.[1] In

[1] The following three extracts from the testimony before the Committee will indicate the attitude of leading steamship representatives relative to the publicity of agreements:

Mr. R. P. Schwerin, Vice president of the Pacific Mail S. S. Co., testified: "I think that everybody in the foreign trade would be only too glad to file their arrangements with a designated department of the government and take up with the government any question that required further explanation or further modification, with the knowledge that the government would permit them to carry on their legitimate business without the necessity of putting in private rates and rebates; they would be only too glad to be relieved of any obligation to make private rates and pay rebates." (Vol. 2, p. 908.)

Mr. Paul Gottheil, representing Funch, Edye & Co. and Chairman of the Committee appointed by steamship line representatives to report to the Committee on the Merchant Marine and Fisheries on the advantages and disadvantages of agreements and conferences, testified: "I believe that it would meet the issue if it was only exacted that agreements should be filed. I believe furthermore, however, that what ever the department may be, they should keep these agreements and consider them as private. In England, when an investigation was held, agreements were surrendered very freely, for the simple reason that nothing was published. It does not seem fair that everybody should know

other words, they believed that the lines should be permitted to make contracts with the knowledge that the same must be filed or are subject to call, thus giving the government the power to determine the merits of any complaints that may be brought; which power should be supplemented with the right to order abuses removed and to protect the complainants against any disciplinary measures which certain lines might wish to inflict.

Publicity of agreements was supported before the Committee not only by most steamship line representatives, but had the indorsement of numerous exporting and importing firms. (Vol. 2, p. 1407.) Even witnesses like Mr. Elijah Warfield, Vice President and General Manager of the Seaboard & Gulf Steamship Co., and Mr. H. H. Haines, Traffic Manager of

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everybody else's business. I think that under these conditions publicity would meet the question and prove satisfactory." (Vol. 1, p. 384.)

Mr. P. A. S. Franklin, Vice president of the International Mercantile Marine Co., testified: "I feel that the present position of the steamship companies is rather an unfortunate one, where all their agreements are looked upon with suspicion, more because the other fellow does not know what is in them than because of what is really in them, and I think, as far as agreements pertaining to business from the United States are concerned, it would not be at all prejudicial to business to have them filed. . . . I do not see any serious objection to publicity, because I believe that all these agreements that so much fuss has been made about are all absolutely reasonable and good economic propositions for the commerce of the United States both east and west bound. If they are not, that is all the more reason why they should be known; that is why I am in favor of filing the eastbound agreements. I do not like to say anything about the westbound situation. It is not one we have any control over here; but as far as the eastbound situation is concerned we do practically control that, and I see no objection to filing the agreements and filing our rates of freight. I do see very serious obstacles and objections to having rates fixed and not subject to change without notice." (Vol. 1, pp. 626, 627.)

the Galveston Commercial Association, whose testimony was unfavorable to agreements and conferences as now conducted, regarded it as absolutely essential that lines engaged in the foreign trade should be permitted to enter into some sort of [313] cooperative agreement, but that all arrangements should be known to the government and be subject to its regulation. The great majority of the supporters of publicity, however, took the view that the agreements, when obtained by the government, should be kept private and not advertised broadcast on the ground that it is unfair for every line to know every other line's business.

Other recommendations.—The remaining suggestions offered to the Committee for proposed legislation deal primarily with the elimination of discrimination between shippers. Briefly stated, it was the consensus of opinion that discrimination between shippers in the matter of rates and cargo space should be absolutely prohibited, and that the relations between the lines and shippers should not be the subject of private and secret negotiations between the parties. Although the difficulty of enforcement was generally admitted, it was frequently suggested that the lines should be compelled to accept cargo from all shippers when offered with due regard to the proper loading of the vessel and the tonnage available, and should be prohibited from refusing accommodations to any shipper by way of retaliation because he may have shipped by an independent line, or may have filed a complaint charging unfair treatment, or for other unjust reasons.

While rebating, as commonly understood, was universally condemned, there was considerable division of opinion as to the desirability of permitting the use of deferred rebate systems. Most of the conference line

representatives, on the one hand, uphold the use of such rebates, especially in the long-distance trades, on the plea that they are equally available to all shippers, irrespective of the size of shipments, and are often necessary to the protection of the lines (which in order to furnish a regular, speedy and efficient service at uniform rates must be assured of the constant support of the shippers in the given trade) against sporadic attacks of tramp vessels which have no permanent interests to conserve and which, unless shippers can be prevented from patronizing them, can easily disorganize and make unprofitable a regular line service. On the other hand, the witnesses identified with independent steamship line projects, such as Messrs. Sidney Story, William Lowry, and Joseph J. Slechta, strongly opposed such rebates, even though they apply only to our import trade, on the ground that they effectively preclude any independent line from obtaining return cargo, thus making it [314] impossible for the line to realize anything but a heavy loss on the round voyage. It should be stated here that small shippers must depend to an increasing extent upon regular line services, and that the tramp vessel is rapidly becoming the carrier for large bulk cargoes. Most of the important complaints from shippers against deferred rebates have come from large firms whose shipments are frequently of such size as to justify the employment of tramp steamers. These firms object to being tied to the regular lines to the exclusion of the use of tramps. In other words, they wish to employ a tramp whenever it suits their convenience, at the same time insisting that the regular lines, whose service is naturally dependent upon the regular support of shippers, be ready at all times to take their shipments when they do not desire to use tramps, i. e., they insist on the regular lines carrying

out their promises relative to speed, good service and regularity, without, however, being able to rely upon the shippers' constant support. [281–314]

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[413] RECOMMENDATIONS OF THE COMMITTEE.

[415] The resolution (H. R. 587) under which the Committee has been investigating shipping combinations directs the Committee "to report to the House all facts disclosed by said investigation, and what legislation, if any, it deems advisable in relation thereto." In compliance with the directions of the resolution relating to legislation, the Committee submits the following recommendations:

RECOMMENDATIONS RELATING TO WATER CARRIERS ENGAGED IN THE FOREIGN TRADE.

The facts contained in the foregoing report show that it is the almost universal practice for steamship lines engaging in the American foreign trade to operate, both on the in-bound and out-bound voyages, under the terms of written agreements, conference arrangements or gentlemen's understandings, which have for their principal purpose the regulation of competition through either (1) the fixing or regulation of rates, (2) the apportionment of traffic by allotting the ports of sailing, restricting the number of sailings, or limiting the volume of freight which certain lines may carry, (3) the pooling of earnings from all or a portion of the traffic, or (4) meeting the competition of nonconference lines. Eighty such agreements or understandings, involving practically all the regular steamship lines operating on nearly every American foreign trade route, are described in the foregoing report. (For a full classification of these agreements see pp. 281 to 295 of the report.) The report also presents the economic advantages and

disadvantages of steamship agreements and conference arrangements as presented to the Committee by steamship line representatives and the exporting and importing interests of the United States. (For a full classification of the advantages and disadvantages see pp. 295 to 307 of the foregoing report.)

In formulating its recommendations it became apparent to the Committee, in view of all the facts presented, that only two courses of action were open for adoption. Either the agreements and understandings, now so universally used, may be prohibited with a view to attempting the restoration of unrestricted competition, or the same may be recognized along lines which would eliminate existing [416] disadvantages and abuses. It is claimed that the adoption of the first course—the prohibition of cooperative arrangements between practically all the lines in nearly all the divisions of our foreign trade—would not only involve a wholesale disturbance of existing conditions in the shipping business but would deprive American exporters and importers of the advantages claimed as resulting from agreements and conferences if honestly and fairly conducted, such as greater regularity and frequency of service, stability and uniformity of rates, economy in the cost of service, better distribution of sailings, maintenance of American and European rates to foreign markets on a parity, and equal treatment of shippers through the elimination of secret arrangements and underhanded methods of discrimination. (A classification of the advantages claimed as resulting from the aforementioned factors is presented on pp. 295 to 303 of the foregoing report.)

These advantages, the Committee believes, can be secured only by permitting the several lines in any given trade to cooperate through some form of rate

and pooling arrangement under Government supervision and control. It is the view of the Committee that open competition cannot be assured for any length of time by ordering existing agreements terminated. The entire history of steamship agreements shows that in ocean commerce there is no happy medium between war and peace when several lines engage in the same trade. Most of the numerous agreements and conference arrangements discussed in the foregoing report were the outcome of rate wars, and represent a truce between the contending lines. To terminate existing agreements would necessarily bring about one of two results; the lines would either engage in rate wars, which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership. Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement. Moreover, steamship agreements and conferences are not confined to the lines engaging in the foreign trade of the United States. They are as universally used in the foreign trade of other countries as in our own. The merchants of these countries now enjoy the foregoing advantages of cooperative arrangements, and to restore open and cutthroat competition among the lines serving the United States would place [417] American exporters at a disadvantage in many markets as compared with their foreign competitors.

Steamship line representatives, as well as the patrons of the lines, were almost a unit in emphasizing to the Committee the importance and necessity of the aforementioned advantages of agreements and conferences, and in asserting that these advantages can only be effected by permitting the several lines in a

given trade to cooperate in the regulation of their rates and the expeditious handling of their business. Very few of the many exporters and importers, who communicated with the Committee, were opposed to agreements and conferences in themselves, provided they are fairly and honestly conducted. Many, however, objected to the secrecy with which agreements and conferences are now conducted; and stated that, while the advantages must be admitted, they have no assurance and no means of knowing whether the conditions claimed for agreements and conferences are always fulfilled. A considerable number of complaints were also filed with the Committee objecting to excessive rates, discrimination between shippers in rates and cargo space, indifference to the landing of freight in proper condition, arbitrariness in the settlement of just claims, failure to give due notice to shippers when rates were to be increased, refusal to properly adjust rates as between various classes of commodities, and the unfairness of certain methods—such as fighting ships, deferred rebates, and threats to refuse shipping accommodations—used by some conference lines to meet the competition of nonconference lines. Unfortunately the truth of many of these complaints could not be ascertained because of the confidential nature of the information furnished. As pointed out in the report (p. 306), it seemed to be the general impression among shippers who filed complaints with the Committee that the conference lines—

> so completely dominate the shippers with whom they deal that these shippers can not afford, for fear of retaliation, to place themselves in a position of active antagonism to the lines by openly giving particulars of their grievances.

While admitting their many advantages, the Com-

mittee is not disposed to recognize steamship agreements and conferences, unless the same are brought under some form of effective government supervision. To permit such agreements without government supervision would mean giving the parties thereto unrestricted right of action. [418] Abuses exist, and the numerous complaints received by the Committee show that they must be recognized. In nearly all the trade routes to and from the United States the conference lines have virtually a monopoly of the line service.

All monopolies—

As pointed out in the foregoing report (p. 304)—

> are liable to abuse, and in our foreign carrying trade the monopoly obtained by the conference lines has not been subjected to any legal control. While carriers by land are supervised and must conform to statutory requirements in the matter of rates and treatment of shippers, steamship companies, through private arrangements, have secured for themselves monopolistic powers as effective in many instances as though they were statutory. Even granting the advantages claimed for steamship conferences and agreements, all may be withdrawn in the absence of supervisory control without the shippers having any redress or protection. The lines are under no legal obligation to continue these advantages. They exercise their powers as private combinations and are apt to abuse the same unless brought under effective government control.

The Committee believes that the disadvantages and abuses connected with steamship agreements and conferences as now conducted are inherent, and can only be eliminated by effective government control; and it is such control that the Committee recommends as the means of preserving to American exporters and importers the advantages enumerated, and of preventing the abuses complained of.

The consensus of opinion (see pp. 307 to 308 of the Report)—

As expressed in the testimony of witnesses and in the numerous communications received by the Committee from shippers—

> is overwhelmingly in favor of some form of government regulation of steamship carriers engaged in this country's foreign trade. Nearly all the steamship line representatives who appeared before the Committee, expressed themselves as not opposed to government supervision which is reasonable and which is limited to the requirements of full publicity and approval of all agreements or arrangements which steamship lines may have entered into with other steamship lines, with shippers, or with other carriers and transportation agencies. On the other hand, the shippers who appeared as witnesses, or otherwise submitted recommendations for proposed legislation, were in the great majority of instances favorable to a comprehensive system of government supervision, sufficiently broad to embrace the regulation of rates without actually fixing them, the approval of contracts, agreements, and arrangements, and the general supervision of all conditions of water transportation which vitally affect the interests of shippers. While few of the shippers who communicated with the Committee by letter (and the same may be said of witnesses) attempted to specify [419] the details of their recommendations, they are almost a unit in stating that they are convinced of the desirability of having the Interstate Commerce Commission, or a similar commission, exercise a general supervisory power over foreign water carriers and enforce among the conference lines at all times the various contentions which they have claimed for themselves during the hearings before the Committee. It is noteworthy that only five of the many communica-

tions received by the Committee, which were unfavorable to steamship agreements and conferences as now conducted, display an attitude of hostility toward government regulation. In fact, many of the communications received from shippers make it clear that the writers regard the contentions of the conference line representatives as advantageous to shipper and shipowner if they are honestly and fairly carried out, but state that their experience has been to the effect that, once the combination of lines is established, it is apt to be used in an arbitrary and unfair way by favoring some large corporation or friend to the detriment of other shippers. Such discriminations and arbitrary treatment, it is believed, can only be eliminated by the establishment of some legally constituted authority which is empowered to hear complaints and to order the discontinuance of abuses.

Relative to such supervisory control by the government of steamship carriers in the foreign trade of the United States, the Committee offers the following recommendations:

(1) That navigation companies, firms or lines engaged in the foreign trade of the United States be brought under the supervision of the Interstate Commerce Commission as regards the regulation of rates, the approval of contracts entered into with other water carriers, with shippers, or with American railroads and other transportation agencies, and such other conditions of water transportation as affect the interests of shippers. The Committee has had under consideration the recommendation of a separate Commission for this purpose, but believes that in view of the close relations existing between rail and water transportation, it would be best to entrust the supervisory control to the Interstate Commerce Commission. If found necessary, in view of the added duties

involved in the extension of the Interstate Commerce Commission's jurisdiction to water transportation in accordance with the recommendations to follow, the Committee further recommends that the membership of the Commission be enlarged.

(2) That all carriers engaged in the foreign trade of the United States, parties to any agreements, understandings, or conference arrangements hereinafter referred to, be required to file for approval with the Interstate Commerce Commission a copy of all written agreements [420], (or a complete memorandum if the understanding or agreement is oral) entered into (1) with any other steamship companies, firms, or lines engaged directly or indirectly in the American trade, or (2) with American shippers, railroads, or other transportation agencies. All modifications and cancellations of such agreements or understandings as may be made from time to time should also be promptly filed. The Commission should be empowered to order canceled any such agreements, or any parts thereof, that it may find to be discriminating or unfair in character, or detrimental to the commercial interests of the United States.

(3) That the Interstate Commerce Commission be empowered to investigate fully complaints charging the unreasonableness or unfairness of rates, or to institute proceedings on its own initiative, and to order such rates changed if convinced that the rate under consideration is unreasonably high, or discriminating in character as between shippers, or ports, or between exporters of the United States and their foreign competitors; and to order restitution to shippers of all sums collected in excess of reasonable rates. This recommendation is also intended to extend to the supervision of freight classifications used by the lines, and the investigation of complaints charging refusal

on the part of any carrier to properly adjust the rates between classes of commodities.

The committee realizes that the steamship business differs essentially from that of the railroads (for those differences see pp. 309 to 311 of the Report), and that it might prove injurious to both ship owners and American exporters to require the lines to file their rates and not be permitted to lower the same until after a stipulated period of notice to change rates had been given. On the other hand, the committee feels that in the absence of government control steamship combinations may in many instances have it within their power to arbitrarily raise rates to an unreasonable degree both as regards the general level and in the case of particular commodities; or, if they so desire, to fail in maintaining rates from the United States to foreign markets on a parity with those from other countries. It is not the purpose of this recommendation to prevent steamship lines from promptly lowering their rates to meet competitive conditions and thus to favor American exporters, who, in competing with foreign markets, often find it necessary in order to close their contracts to have quoted an immediate and favorable rate; but the purpose of the law [421] should be to protect the shipper against any unreasonably high rate which the combination lines may have within their power, by virtue of their agreements and conference arrangements, arbitrarily to impose in the absence of government supervision and control.

(4) That rebating of freight rates to shippers be made illegal; and that, with due regard to the proper loading of the vessel and the tonnage available, discrimination between shippers, or ports, in the matter of rates and space accommodations be prohibited. In this connection it is the belief of the committee that water carriers should be required to charge equal

rates to all shippers, irrespective of the volume of freight offered for shipment.

(5) That the Interstate Commerce Commission be empowered to investigate fully all complaints (or to undertake such investigation on its own initiative) charging (1) failure on the part of any carrier to give reasonable notice of increase in rates, (2) unfair treatment of shippers in the matter of cargo space and other facilities, (3) the existence of discriminating or unfair contracts with certain shippers, and (4) unfairness in the settlement of claims and indifference to the landing of freight in proper condition. In this connection the Commission should be empowered to order the discontinuance of all unfair or discriminating practices which it may find to exist, and to adopt whatever measures it may deem necessary to protect the complainant against retaliation.

(6) That the use of "fighting ships" and deferred rebates be prohibited in both the export and import trade of the United States. Moreover, all carriers should be prohibited from retaliating against any shipper by refusing space accommodations when such are available, or by resorting to other unfair methods of discrimination, because such shipper has patronized an independent line, or has filed a complaint charging unfair treatment, or for any other reason.

(7) That adequate penalties be provided to correct and prevent the abuses hereinabove set forth.

RECOMMENDATIONS RELATING TO WATER CARRIERS ENGAGED IN THE DOMESTIC TRADE.

Unlike the practice of water carriers in the foreign trade of the United States, agreements to divide the territory or charge certain rates in the domestic trade are few. Competition in rates between domestic water lines, however, has been quite as effectively

eliminated [422] as in the foreign trade and this has been accomplished by the several lines through one or more of the numerous methods discussed in Part II of the foregoing report and summarized on pp. 409 to 412. (Also see pp. 403 to 412 giving a "summary of the extent and methods of control of competition between water carriers in the domestic trade.")

The Act of August 24, 1912, providing for the opening, maintenance, protection and operation of the Panama Canal, contains provisions extending the jurisdiction of the Interstate Commerce Commission over interstate transportation which involves the carriage of property by rail and water, in the following particulars: viz., (1) to establish physical connection, where this is reasonably practicable and justifiable, between the rail carrier and the dock of the water carrier by directing either or both of the carriers to construct the connecting tracks; (2) "to establish through routes and maximum joint rates over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced"; and (3) "to establish maximum proportional rates by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates will apply." Section 11 of the Act also provides for the divorcing of common carriers by water from the railroads under certain conditions. These legislative requirements go far toward eliminating some of the undesirable practices which were found by the Committee to exist in the domestic commerce of the United States. The Committee, however, believes, in view of the facts presented in Part II of the report, that additional

legislation is required, and wishes to offer the following recommendations:

(1) That the jurisdiction of the Interstate Commerce Commission be extended to the interstate port-to-port traffic of domestic water carriers, with full power to require all such carriers to file their port-to-port rates and to submit reports of their financial and business operations. As regards interstate port-to-port traffic the Commission should be given full power to regulate rates and to determine maximum charges.

(2) That water carriers be required to file for approval with the Interstate Commerce Commission all agreements or arrangements [423] affecting interstate transportation, whether written or oral, and all modifications or cancellations thereof, with other water carriers, with railroads or other transportation agencies, or with shippers.

(3) That the carriers be prohibited from granting rebates of any kind to shippers and from discriminating between shippers in rates, in the giving of space accommodations and other facilities, and in the making of unfair contracts based on the volume of freight offered. Water carriers should also be prohibited from using fighting ships, or deferred rebates, or from threatening or resorting to retaliatory or other unfair measures against shippers or competitors. The Interstate Commerce Commission should be empowered to adopt whatever measures it may consider necessary to protect shippers or competitors against such retaliatory methods. Water carriers, if cutting rates with a view to driving out a competitor, should be denied the privilege of restoring rates; and jurisdiction should be conferred on the Interstate Commerce Commission to determine

whether rates were cut with the object of crushing such competitor.

(4) That the Interstate Commerce Commission be empowered to investigate fully all complaints charging unfairness in the settlement of claims, and indifference to the loading and landing of freight in proper condition; and to adopt all necessary rules and regulations for the adjustment and settlement of claims.

(5) That as regards all matters relating to Interstate transportation, all traffic associations or conferences, whether pertaining to through rail-and-water transportation or to port-to-port traffic only, be brought under the supervision of the Interstate Commerce Commission. The Committee recommends that the conditions under which an outside water carrier is admitted to such associations or conferences should be approved by the Commission, and that an outside line should not be denied membership for unfair reasons or simply because the unanimous consent of existing members of the association or conference to the admission of said line cannot be obtained.

(6) That the railroads be prohibited from making the through rail-and-water route unprofitable as compared with the all-rail route by charging more for the same service on waterborne commodities than they charge for the proportionate share of the all-rail haul.

(7) That the Interstate Commerce Commission be empowered to compel railroads to allow competitive water carriers to apply effective [424] differentials. The Commission should also have full supervisory power over divisions between railroads and water carriers as regards through rail-and-water rates. The Committee recommends that rate divisions on any trade route should be opened equally to all water carriers that comply with such conditions of quality and regu-

larity of service as the Commission may determine to be reasonable.

(8) That the railroads and water carriers be required to issue through bills of lading to all interstate water carriers that meet such conditions of quality and regularity of service as the Interstate Commerce Commission may consider reasonable.

(9) That railroads be required to account separately to the Interstate Commerce Commission for the income and expenditures of interstate water lines owned or controlled by them.

(10) That railroads be required to make their terminal facilities available to water carriers on equal terms and under such reasonable conditions as the Interstate Commerce Commission may prescribe. The Committee also believes that the Federal Government should pursue a policy of not expending money in the interests of any port for harbor or channel improvements, unless that port has efficient dock facilities available to all water carriers.

(11) That there should be legislation providing for equal treatment to all shippers and water carriers by transfer and lighterage concerns when forming a link in interstate or foreign commerce.

(12) That all interstate traffic on canals be placed under the supervision of the Interstate Commerce Commission; and that the railroads be prohibited in the future from acquiring, either directly or indirectly, ownership and control of or interest in canals, or water lines, forwarding companies and other navigation facilities on such canals, when the same are used in interstate transportation.

Respectfully submitted.

J. W. ALEXANDER,
Chairman.

U. S. GOVERNMENT PRINTING OFFICE: 1951

MOTION FILED AUG 7 1957

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 73-74

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE; MITSUI STEAMSHIP CO., LTD., KAWASAKI KISEN KAISHA, NISSAN KISEN KAISHA, LTD., TOHO KAIUN KAISHA, LTD.; IINO KAIUN KAISHA, LTD., MITSUBISHI KAIUN KAISHA, LTD.; KOKUSAI KAIUN KAISHA, LTD.; NIPPON YUSEN KAISHA; OSAKA SHOSEN KAISHA, LTD.; SHINNIHON STEAMSHIP CO., LTD.; YAMASHITA KISEN KAISHA; WILHELMSENS DAMPSKIBSAKTIESELSKAB; A/S DEN NORSKE AFRIKA-OG AUSTRAILIELINIE; A/S TONSBERG; A/S TANKFART I; A/S TANKFART IV; A/S TANKFART V; A/S TANKFART VI; SKIBSAKTIESELSKAPET VARILD; SKIBSAKTIESELSKAPET MARINA; AKTIESELSKABET GLITTRE; DAMPSKIBSINTERESSENTSKABET GARONNE; SKIBSAKTIESELSKAPET SANGSTAD SKIBSAKTIESELSKAPET SOLSTAD; SKIBSAKTIESELSKAPET SILJESTAD; DAMPSKIBSAKTIESELSKABET INTERNATIONAL; SKIBSAKTIESELSKAPET MANDEVILLE; SKIBSAKTIESELSKAPET GOODWILL; DAMPSKIBSELSKABET AF 1912 AKTIESELSKAB; AKTIESELSKABET DAMPSKIBSSELSKABET SVENDBORG; SKIBSAKTIESELSKAPET IGADI; A/S RESCO; AKTIESELSKAPET IVARANS REDERI; A/S LISE; THE DE LA RAMA STEAMSHIP CO., INC.; THE OCEAN STEAM SHIP CO., LTD.; THE CHINA MUTUAL STEAM NAVIGATION COMPANY, LTD., NEDERLANDSCHE STOOMVAART MAATSHAPPIJ "OCEAAN" N.V.; THE SWEDISH EAST ASIA CO., LTD.; WATERMAN STEAMSHIP CORPORATION; LYKES BROS. STEAMSHIP CO., INC.; UNITED STATES LINES COMPANY; STATES MARINE CORPORATION; STATES MARINE CORPORATION OF DELAWARE; DAIDO KAIUN KAISHA; AMERICAN PRESIDENT LINES, LTD.;

Petitioners,

— against —

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, ISBRANDTSEN COMPANY, INC., AND EZRA TAFT BENSON, Secretary of Agriculture,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION TO FILE BRIEF AND BRIEF *AMICUS CURIAE*, SUBMITTED ON BEHALF OF THE STEAMSHIP CONFERENCES, PACIFIC AMERICAN STEAMSHIP ASSOCIATION, AND THEIR MEMBER LINES LISTED IN APPENDIX A

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 73-74

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE; MITSUI STEAMSHIP CO., LTD., KAWASAKI KISEN KAISHA, NISSAN KISEN KAISHA, LTD., TOHO KAIUN KAISHA, LTD., IINO KAIUN KAISHA, LTD., MITSUBISHI KAIUN KAISHA, LTD.; KOKUSAI KAIUN KAISHA, LTD.; NIPPON YUSEN KAISHA; OSAKA SHOSEN KAISHA, LTD.; SHINNIHON STEAMSHIP CO., LTD.; YAMASHITA KISEN KAISHA; WILHELMSENS DAMPSKIBSAKTIESELSKAB; A/S DEN NORSKE AFRIKA-OG AUSTRAILIELINIE; A/S TONSBERG; A/S TANKFART I; A/S TANKFART IV; A/S TANKFART V; A/S TANKFART VI; SKIBSAKTIESELSKAPET VARILD; SKIBSAKTIESELSKAPET MARINA, AKTIESELSKABET GLITTRE; DAMPSKIBSINTERESSENTSKABET GARONNE; SKIBSAKTIESELSKAPET SANGSTAD SKIBSAKTIESELSKAPET SOLSTAD; SKIBSAKTIESELSKAPET SILJESTAD; DAMPSKIBSAKTIESELSKABET INTERNATIONAL; SKIBSAKTIESELSKAPET MANDEVILLE; SKIBSAKTIESELSKAPET GOODWILL; DAMPSKIBSELSKABET AF 1912 AKTIESELSKAB; AKTIESELSKABET DAMPSKIBSSELSKABET SVENDBORG; SKIBSAKTIESELSKAPET IGADI; A/S BESCO; AKTIESELSKAPET IVARANS REDERI; A/S LISE; THE DE LA RAMA STEAMSHIP CO., INC.; THE OCEAN STEAM SHIP CO., LTD.; THE CHINA MUTUAL STEAM NAVIGATION COMPANY, LTD.; NEDERLANDSCHE STOOMVAART MAATSHAPPIJ "OCEAAN" N.V.; THE SWEDISH EAST ASIA CO., LTD.; WATERMAN STEAMSHIP CORPORATION; LYKES BROS. STEAMSHIP CO., INC.; UNITED STATES LINES COMPANY; STATES MARINE CORPORATION; STATES MARINE CORPORATION OF DELAWARE; DAIDO KAIUN KAISHA; AMERICAN PRESIDENT LINES, LTD.;

Petitioners,

— against —

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, ISBRANDTSEN COMPANY, INC., AND EZRA TAFT BENSON, Secretary of Agriculture,

Respondents.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Now come movants, the thirty-five Conferences, Pacific American Steamship Association, and the one hundred fifteen common carrier steamship lines which comprise their membership, listed in Appendix A below, and respect-

fully move this Court for leave to file the accompanying brief in this case *amicus curiae*.

Consent for the filing of this brief was requested of and has been obtained from the following petitioners and respondents: United States of America; Federal Maritime Board, Ezra Taft Benson, Secretary of Agriculture, Japan-Atlantic and Gulf Freight Conference and its member lines.

The consents from all the foregoing have been filed with the Clerk of this Court. Consent for filing of this brief was requested of the respondent, Isbrandtsen Company, Inc., but was refused by its counsel, John J. O'Connor, Esq., on July 20, 1957. This was the only refusal.

None of the moving steamship lines are parties to this action. However, they are all members of various steamship rate-making Conferences, which are concerned with the determination of the issues herein as such determination may constitute a precedent in the interpretation and application of the Shipping Act, 1916. These Conferences were organized under agreements filed with and approved by the Federal Maritime Board, or its predecessors, pursuant to the provisions of Section 15 of the Shipping Act, 1916 46 U. S. C. Section 814. The Conferences were formed for the purpose of co-operative membership action in the fixing of freight rates for the transportation of cargo between United States ports on the East, Gulf, and West Coasts of the United States and foreign countries throughout the rest of the world. The Conferences have their principal offices at the following places: New York, New York; San Francisco, California; Los Angeles, California; New Orleans, Louisiana; and various ports of other countries in the Eastern and Western Hemispheres. The steamship lines are corporations organized and existing by virtue of the laws of various states of the United States and foreign countries, having offices or representatives in several states of the United States. They are all engaged as common carriers by water in foreign commerce between ports of the United States and the foreign areas indicated

by the Conference names. Pacific American Steamship Association (hereinafter referred to as the "Association") is an organization composed wholly of American common carrier steamship lines, operating between the West Coast of the United States and various other ports throughout the world.[1]

The Conferences and the steamship member lines are subject to the jurisdiction of the Federal Maritime Board. Acting under Conference agreements, the Conferences and their member lines have for many years maintained systems of exclusive patronage contracts with shippers under which one set of rates is offered to those shippers who do not contract in advance to ship exclusively on the vessels of Conference members, and another lower schedule of rates is offered to those who contract in advance to ship exclusively on the vessels of Conference members.

Rate structures have been determined thereunder and trade relationships have developed and flourished in the trades served by the Conferences and carriers on whose behalf this motion is made. Until the decision below in the Court of Appeals, the question of the lawfulness of dual rate systems has been one on which the carriers and Conferences have looked to the Federal Maritime Board for guidance for many years. The carriers believed that the Board was entrusted with the responsibility of determining as a fact whether any particular contract rate system should be approved under the Shipping Act, 1916.

In the present case the Board found that the dual-rate system, as it would be employed by petitioners, was a proper one in that it was necessary to maintain rate stability in the Japan-Atlantic & Gulf trade and to prevent destructive rate wars; that the proposed spread between contract and non-contract rates was reasonable; and that the proposed dual-rate system should be approved pursuant to the provisions of Section 15 of the Shipping Act. The

[1] The only common carrier steamship members of the Association who are parties to this motion and attached brief are those which use dual-rate systems.

Court of Appeals in this case set the Board's order aside on the ground that the dual-rate system was unlawful under Section 14, Third of the Shipping Act.

Movants earnestly desire that a reasonably short brief be filed on their behalf in order that the Court may have before it the point of view of these Conferences, the Association, and their steamship member lines, because the decision in this case might have far-reaching consequences for them and the public. The steamship lines are concerned lest the law may now be interpreted as proscribing the dual-rate systems which they have maintained over many years, with the specific knowledge of the Federal Maritime Board and with general recognition thereof by Congress. As members of Conferences, most of which have employed for many years the dual-rate system, the carriers have a vital interest in these issues. They are concerned with the protection of established business relationships and are naturally anxious that economic ties which have been built up over the past thirty years shall not be destroyed. This would be the inevitable result of affirmance of the decision below.

Thousands of American shippers and consignees, as parties to dual-rate contracts have valuable rights thereunder, particularly during a period of rising freight rates and shortage of shipping tonnage. Therefore, these Conferences and the carriers employing the dual-rate system are moving to file the attached brief *amicus curiae* in this proceeding to safeguard the contractual interests of all parties—shippers, consignees and carriers.

The considerations of public policy that attach to their purpose are important at any time. They are particularly important at the present time because the future of this nation and even its survival may depend upon the continuity of well ordered trade relationships and a strong, vigorous, and healthy Merchant Marine.

The question of whether the contract, non-contract rate system is illegal *per se* is one of the utmost seriousness to

the shipping public and the Conferences. Their member lines are leading steamship carriers in trades which reach all parts of the world. Movants believe that they will be able to place before this Court considerations supplementing those which will be urged by the parties to this case and which will be of assistance to the Court. Nevertheless, they will not be of such length as to be burdensome to the Court.

The parties to the case in the Court below and in this Court must necessarily concern themselves with the specific issues of the case. Movants believe that these issues need to be considered within a larger economic and historic framework than the petitioners and respondents could develop for the Court. Movants will be able to show to the Court the widespread interest of the shipping industry in the issues presented and demonstrate the worldwide effect of the decision below on this industry, which petitioners and respondents will not do. Movants believe that the arguments they present are indispensable to a proper decision of this Court.

For the foregoing reasons, it is respectfully requested that this application for leave to file a brief as *amici curiae* be granted.

Respectfully submitted,

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APPENDIX A

STEAMSHIP CONFERENCES

Associated Steamship Lines (Manila)
Atlantic and Gulf-Indonesia Conference
Atlantic and Gulf/Panama Canal Zone, Colon and Panama City Conference
Atlantic and Gulf-Singapore, Malaya and Thailand Conference
Atlantic and Gulf/West Coast of Central America and Mexico Conference
Atlantic and Gulf/West Coast of South America Conference
Brazil/United States-Canada Freight Conference
Calcutta/U. S. A. Conference
Deli/New York Rate Agreement
East Coast Colombia Conference
East Coast South America Reefer Conference
Far East Conference
Gulf/French Atlantic Hamburg Range Freight Conference
Gulf/Mediterranean Ports Conference
Gulf/United Kingdom Conference
Havana Northbound Conference
Havana Steamship Conference
India, Pakistan, Ceylon & Burma Outward Freight Conference
Java-New York Rate Agreement
Leeward & Windward Islands & Guianas Conference
Mid Brazil/United States-Canada Freight Conference
New York Freight Bureau (Hong Kong)
North Brazil/United States-Canada Freight Conference
Pacific Indonesian Conference
Pacific Straits Conference
Pacific Westbound Conference
River Plate and Brazil Conference
River Plate/United States-Canada Freight Conference
Santiago de Cuba Conference
Straits/New York Conference
U. S. Atlantic and Gulf/Australia-New Zealand Conference
U. S. Atlantic & Gulf Ports-Jamaica (B. W. I.) S. S. Conference

U. S. Atlantic & Gulf-Venezuela and Netherlands Antilles Conference
United States Atlantic & Gulf-Haiti Conference
West Coast South America Northbound Conference
Pacific American Steamship Association*

THE FOLLOWING COMMON CARRIER STEAMSHIP LINES ARE MEMBERS OF ONE OR MORE OF THE FOREGOING CONFERENCES:

Aktieselskabet Atlas
Aktiebolaget Svenska Amerika Linien
Alcoa Steamship Company, Inc.
American Export Lines, Inc.
American Mail Line, Ltd.
Angfartygsaktiebolaget Tirfing
Armement Deppe, S.A.
A/S Atlantica
A/S J. Ludwig Mowinckels Rederi
Atlantic Ocean Transport Corporation
Bloomfield Shipping Company
Booth American Shipping Corporation
Buccaneer Line, Inc.
Cia. Argentina de Navegacion Dodero
Compagnie de Transports Oceaniques
Compagnie Generale Transatlantique
Compagnie Maritime Belge, S.A.
Compagnie Maritime Congolaise, S.C.R.L.
Compania Colombiana de Navegacion Maritima
Compania de Navegacion Dalpha, S.A.
Compania Maritima del Nervion
Compania Naviera Cubamar, S.A.
Compania Sud Americana de Vapores
Compania Transatlantica Espanola, S.A.
Dampskibsaktieselskabet Alaska
Dampskibsaktieselskabet Golden Gate
Dampskibsaktieselskabet Idaho
Dampskibsaktieselskabet Jeanette Skinner

* Association of United States steamship lines operating from the west coast of the United States.

Dampskibsaktieselskabet Lisbeth
Dampskibsselskabet Torm
Deutsche Dampfschiffahrts-Gesellschaft "Hansa" Bren
(Germany
Dovar S.A. International Shipping & Trading Co.
Eckert Steamship Corp.
Ellerman Lines, Ltd.
Ellerman & Bucknall Steamship Co., Ltd.
Federal Steam Navigation Co., Ltd.
Flota Mercante del Estado
Flota Mercante Grancolombiana, S.A.
Grace Line, Inc.
Gulf & South American Steamship Co., Inc.
Hall Line, Ltd.
Hamburg Amerika Linie
Hamburg-Suedamerikanische Dampfschiffahrts
Gesellschaft Eggert & Amsinck
Hellenic Lines Limited
Hugso Stinnes O. H. "Brenntag", Brennstoff-,
Chemikalien-und Transport, G.m.b.H.
Hvalfangstaktieselskapet Suderoy
Isthmian Lines, Inc.
Israel America Line, Ltd.
Khedival Mail Line, S.A.E.
Koninklijke Rotterdamsche Lloyd, N.V.
Lamport & Holt Line, Ltd
Larrinaga Steamship Co., Ltd.
Lloyd Brasileiro
Marina Mercante Nicaraguense, S.A.
Matson Navigation Company
M. Dizengoff & Co. (Shipping) 1949, Ltd.
M. Dizengoff & Co. (Navigation) 1951, Ltd.
Mississippi Shipping Co., Inc.
Moore-McCormack Lines, Inc.
Naviera Vacuba, S.A.
Navigazione Alta Italia-Genoa
New Zealand Shipping Co. Ltd.
Norddeutscher Lloyd
North Atlantic & Gulf Steamship Company, Inc.
Nitto Shosen Co. Ltd.
N. V. Koninklijke Paketvaart Maatschappij

N. V. Nederlandsch-Amerikaansche Stoomva
Maatschappij-"Holland-Amerika Lijn"
N. V. Stoomvart Maatschappij "Nederland"
Ozean Linie G.m.b.H.
Pacific Far East Line, Inc.
Pacific Transport Lines, Inc.
Panama Canal Company
Philippine National Lines
Port and Associated Lines
Prince Line, Ltd.
Prudential Steamship Corporation
Rederiaktiebolaget Disa
Rederiaktiebolaget Fredrika
Rederiaktiebolaget Poseidon
Rederiaktiebolaget Svenska Lloyd
Royal Netherlands Steamship Company
Skibsaktieselskapet Abaco
Skibsaktieselskapet Arizona
Skibsaktieselskapet Aruba
Skibsaktieselskapet Astrea
Skibsaktieselskapet Marie Bakke
Skibsaktieselskapet Noruega
Skibsaktieselskapet Ogeka
Skibsaktieselskapet Pacific
Skipsaksjeselskapet Hilda Knudsen
Skipsaksjeselskapet Samuel Bakke
Skipsaktieselskapet Kirkoy
Skipsaktieselskapet Nordheim
Skipsaktieselskapet Skagerak
Skipsaktieselskapet Vito
States Steamship Company
Stockard Steamship Corporation
Stockholms Rederiaktiebolag Svea
The Bank Line Limited
The Booth Steamship Co., Ltd.
The City Line, Ltd.
The Cunard Steam-Ship Company Ltd.
The East Asiatic Company, Ltd.
The Northern Pan-America Line, A/S
Thos. and Jas. Harrison, Ltd.
Thos. & Jno. Brocklebank, Ltd.

Three Bays Corp., Ltd.
United Fruit Company
Van Nievelt, Goudriaan & Co.'s Stoomvaart Maatschappij N.V.
Victorias Milling Company, Inc.
Ward Garcia, S.A.
West Coast Line
Westfal-Larsen & Co., A/S
Westley Shipping Co., Inc.
Zim Israel Navigation Co., Ltd.

IN THE

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JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE; MITSUI STEAMSHIP CO., LTD., KAWASAKI KISEN KAISHA, NISSAN KISEN KAISHA, LTD., TOHO KAIUN KAISHA, LTD.; IINO KAIUN KAISHA, LTD., MITSUBISHI KAIUN KAISHA, LTD.; KOKUSAI KAIUN KAISHA, LTD.; NIPPON YUSEN KAISHA; OSAKA SHOSEN KAISHA, LTD.; SHINNIHON STEAMSHIP CO., LTD.; YAMASHITA KISEN KAISHA; WILHELMSENS DAMPSKIBSAKTIESELSKAB; A/S DEN NORSKE AFRIKA-OG AUSTRAILIELINIE; A/S TONSBERG; A/S TANKFART I; A/S TANKFART IV; A/S TANKFART V; A/S TANKFART VI; SKIBSAKTIESELSKAPET VARILD; SKIBSAKTIESELSKAPET MARINA; AKTIESELSKABET GLITTRE; DAMPSKIBSINTERESSENTSKABET GARONNE; SKIBSAKTIESELSKAPET SANGSTAD SKIBSAKTIESELSKAPET SOLSTAD; SKIBSAKTIESELSKAPET SILJESTAD; DAMPSKIBSAKTIESELSKABET INTERNATIONAL; SKIBSAKTIESELSKAPET MANDEVILLE; SKIBSAKTIESELSKAPET GOODWILL; DAMPSKIBSELSKABET AF 1912 AKTIESELSKAB; AKTIESELSKABET DAMPSKIBSSELSKABET SVENDBORG; SKIBSAKTIESELSKAPET IGADI; A/S BESCO; AKTIESELSKAPET IVARANS REDERI; A/S LISE; THE DE LA RAMA STEAMSHIP CO., INC.; THE OCEAN STEAM SHIP CO., LTD.; THE CHINA MUTUAL STEAM NAVIGATION COMPANY, LTD.; NEDERLANDSCHE STOOMVAART MAATSHAPPIJ "OCEAAN" N.V.; THE SWEDISH EAST ASIA CO., LTD.; WATERMAN STEAMSHIP CORPORATION; LYKES BROS. STEAMSHIP CO., INC.; UNITED STATES LINES COMPANY; STATES MARINE CORPORATION; STATES MARINE CORPORATION OF DELAWARE; DAIDO KAIUN KAISHA; AMERICAN PRESIDENT LINES, LTD.;

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UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, ISBRANDTSEN COMPANY, INC., AND EZRA TAFT BENSON, Secretary of Agriculture,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICUS CURIAE*, SUBMITTED ON BEHALF OF THE STEAMSHIP CONFERENCES, PACIFIC AMERICAN STEAMSHIP ASSOCIATION, AND THEIR MEMBER LINES LISTED IN APPENDIX A OF THIS BRIEF

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Statement of Interest.

The parties on behalf of whom this brief *amicus curiae* is filed are thirty-five Conferences, Pacific American Steamship Association (hereinafter referred to as the "Association"), and their common carrier steamship member lines, operating to and from all the major ports of the United States in foreign commerce. The parties embrace *inter alia* almost every subsidized common carrier now operating on trade routes considered to be essential by the American Government and subsidized by the Government under the jurisdiction of the Federal Maritime Administration and Board.

American flag carriers and most of their foreign flag competitors have grouped themselves into Conferences. The purpose of these Conferences is to assure that all of the carriers in a given trade shall charge uniform rates to all shippers, large and small, to avoid wide and frequent fluctuations in freight rates, and to take all other steps necessary for the development of American commerce. The Conferences have been organized and operate under Agreements made among the member steamship lines. These Agreements, together with all changes and modifications, have been approved by the Federal Maritime Board[1] pursuant to Section 15 of the Shipping Act, 1916, 46 U. S. C. Section 814. Generally speaking, each Conference embraces common carriers, both American and foreign, operating between the Gulf, the East or the West Coasts of the United States, on the one hand, and some other unified geographical sector in either the Eastern or Western Hemisphere which can be reached by a water route. The common carrier members of the Association operate to and from Pacific coast ports in international trade.

The Conferences and all individual lines, parties to this

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[1] Throughout this brief the Federal Maritime Board, the Maritime Commission and all earlier agencies which have administered the Shipping Act are collectively referred to as "the Board".

brief, have established dual-rate systems, under which each has made available uniform rates for shippers in their respective trades at two levels. The lower rate level has been made available to all shippers, large or small, who contract in advance with the member lines of the Conference to confine all of their shipments to the ships of the member lines either during a stated period or an indefinite period terminable after a stated interval of notice by either party. There are varying collateral promises made by both sides. The higher level of rates is offered shippers who for business or other reasons do not elect to assume the obligations imposed by the contracts. During the period that these contract rate systems have been operating, the member lines of the Conferences and the Association have invested billions of dollars in ships, in ships' terminals, and all of the other facilities needed to carry the cargo of American shippers in foreign commerce. The carriers, parties to this brief, operate hundreds of vessels of all types in the foreign commerce of the United States today.

The Conferences for whom this brief is filed, did not participate in the proceedings before the Board or the Court of Appeals. However, the scope of the decision rendered by the Court of Appeals, if read literally, is so broad that these Conferences and their members are anxious to lay before this Court on their own behalf and on behalf of the many thousands of merchants benefited by the contracts their reasons for believing that the Court below erred and to show this Honorable Court the far-reaching economic impact of the decision below.

This brief will endeavor to show this Court that, contrary to assertions by Isbrandtsen and the Departments of Agriculture and Justice, Congress, in enacting the Shipping Act, provided a basis for approval of dual-rate systems and that the economic reasons which made such systems necessary in 1916 are even more cogent today, so that instead of being illegal *per se* such systems are necessary

to promote the foreign commerce of the United States within the meaning and purpose of the Shipping Act.

Each of the Conferences has as its primary purpose the maintenance of agreed rates among the members at levels which will permit an unrestricted interchange of merchandise and attempt to insure at least a minimum return on investment and thereby guarantee necessary replacement and modernization of tonnage. The Conferences strive to meet both the general and the special transportation requirements of the shippers in their trade. In that respect they are constantly seeking to maintain a regular, dependable pattern of service for the convenience of the shippers and to make available to the shippers the latest technological advances.

There are non-conference steamship lines maintaining berth services in some of the trades served by the member lines. In every instance, membership in these Conferences is open to Isbrandtsen or to any other common carriers intending in good faith to operate regularly in any of these trades.

Summary of Argument.

From the language of the Shipping Act, 1916, itself and its legislative history, it is clear that the dual rate system is not illegal *per se*. Prior to the enactment of the Shipping Act, the Courts had already determined that an exclusive patronage dual-rate system was not illegally discriminatory. In the case of *Menacho* v. *Ward*, 27 Fed. 529 (S. D. N. Y., 1886) discrimination for past patronage of an outside line was recognized and condemned. The Court below in the present case did not appreciate the distinction made by the earlier courts and failed properly to distinguish between advance, contractual commitments and conduct which in fact constitutes retaliation.

The Shipping Act, 1916, reflects the Alexander Committee's analysis of Conference competitive methods which

was accepted by Congress. The Alexander Report shows the Committee's awareness of the competitive methods used by Conferences operating in the United States and Great Britain. The Conferences at that time had striven to protect themselves from the tramp operator and outside lines principally by the deferred rebate and the dual-rate system. The Committee pointed out that the dual-rate system gave the shipper a free election at all times and that the undesirable element of postponement and possible retaliation which could be found in deferred rebate systems was not present in the dual-rate systems.

Since the enactment of the Shipping Act, 1916, during years in which conferences domiciled in the United States continued to use the dual-rate system, Congress frequently dealt with merchant shipping affairs and hearings were held from which evolved the Merchant Marine Acts of 1920, 1928, and 1936. Once again in 1950, the Senate Committee on Interstate and Foreign Commerce dealt with shipping problems in a comprehensive fashion and recognized the relationship between the contract rate system and the desirable objective of rate stability. Despite the fact that Congress has in the years since World War I considered the dual-rate system on several occasions, it has made no restrictive move towards dual-rate systems of any kind.

The Court of Appeals was in error when it held that Section 14 Third, even conceding *arguendo* that it applies to rate action, prevented the use of dual-rate systems in the following respects:

A. The language of Section 14, First of the Shipping Act does not prevent the payment of discounts in consideration for exclusive patronage, when such discounts are available to all shippers and are paid promptly upon the completion of the service.

B. When the Court of Appeals chose to read Section 14, Third to prohibit the dual-rate system

as being retaliatory and a discriminating method, it stripped the word "retaliation" of its accepted meaning.

C. The Court of Appeals by its reasoning has incorrectly ruled out incentive rates of any kind and is at variance with prior decisions of the Board and other courts which have considered the use of a dual-rate scale to be merely the making available of a discount to shippers willing to contract in advance to use the member lines of the Conference exclusively.

D. When the Shipping Act is read it is apparent that the words "discriminating or unfair methods" contained in Section 14, Third should be considered as modified by the word "unjustly". Any other interpretation of the clause does violence to the Shipping Act as a whole.

The decision below is in conflict with prior decisions of this Court. In the case of *U. S. Navigation* v. *Cunard S. S. Co.*, 284 U. S. 474 (1932), this Court specifically considered the contention that the dual-rate system involved in that case was unlawful *per se* and there rejected that contention. From the language of that decision, it appears that this Court recognized that a dual-rate system could be legal and that it was for the Board to make the necessary factual determination as to whether or not the use of the system should be permitted. Had the Court been of the opinion that a dual-rate system was illegal *per se* there would have been no purpose in referring the matter back to the Board. Once again in *Swayne & Hoyt* v. *United States*, 300 U. S. 297 (1937), this Court recognized that dual-rate systems do not *per se* violate the Shipping Act. By pointing out that the Board in earlier decisions had jurisdiction to pass upon dual-rate systems under the Shipping Act, we submit, this Court considered that such systems were not illegal *per se* under the Shipping Act.

The economic reasons which necessitated the institution of dual-rate systems by conferences in the first two decades of this century are equally valid today, and the continuance of the systems is essential for a healthy merchant marine and for adequate service in foreign commerce. There has been a marked increase in the size of vesssels used and a substantial increase in labor, manning and port charges, resulting in heavy fixed costs, so that Conference carriers must be assured of being able to carry minimum tonnage before they can economically schedule regular sailings. Only a few sailings with inadequate cargo would cause serious economic distress to these carriers. Unless the Conference carriers can obtain satisfactory commitments from shippers in return for their own commitments to pay for the necessary tonnage in the trade, they will always be in doubt as to whether or not there will be sufficient cargo available to fill their large ships at sailing times.

If the opinion below is upheld, it will destroy trading relationships prevailing throughout the world with shippers who have dealt for many years with the Conferences. In areas which have previously known quiet and reasonably stable ocean rates, the outbreak of rate wars with their consequent disastrous effects can be anticipated. Thus, the fundamental question before this Court includes matters of the greatest economic consequence to the commerce of the United States. American flag operators, because of high labor costs, would necessarily be the first to suffer under such circumstances. Stable ocean transportation requires stable rates, regularity of sailings and service, and financially responsible carriers. Without rate stability these objectives cannot be achieved.

ARGUMENT

POINT I.

The language of the Shipping Act, 1916, and its legislative history support the conclusion that the dual-rate system is not illegal *per se*.

The opinion below turns on Section 14, Third of the Shipping Act, 1916. However, any attempt to ascertain the meaning of that section must involve some exploration of the genesis of the Shipping Act of which it forms a part. Examination of the common law cases antedating regulation is equally helpful.

(A) The Common Law Background of Dual-Rates.

Prior to the Shipping Act, 1916, American Courts had to consider shipping problems against a common law background. A study of the contrasting holdings in the leading cases of *Lough* v. *Outerbridge*, 143 N. Y. 271 (1894), and *Menacho* v. *Ward*, 27 Fed. 529 (S. D. N. Y., 1886), is warranted because of the legal criteria developed therein in connection with the pivotal issue in this case. At the time those cases were decided, steamship Conferences had developed two methods of attracting shippers and meeting non-conference competition. These were the deferred rebate and the exclusive patronage dual-rate system. In the *Lough* case, *supra*, the Court made a clear-cut finding that an exclusive patronage dual-rate system was not unduly discriminatory, since the parties had made a special contract. The Court held that the carriers were justified in offering a discount in return for their reliance on the advance covenant of the shippers to give all their business to the carrier member lines of the Conference, and that they were similarly justified in refusing to make the lower rates available to other shippers who were unwilling to make a similar advance commitment.

The Court pointed out that a valid reason justifying the system was that it gave the carriers the assurance of a certain amount of cargo and put them in a position where they could better provide adequate frequent service for the shippers. Such service ultimately brought benefit to the shipping public in the form of lower and more stable rates. The Court was at pains to point out in the *Lough* case that the special contracts between the carriers and the shippers were entered into *in advance* of any movement. Therefore, the Court said, it was not possible that illegal discrimination could be involved.

The *Menacho* case, *supra,* is linked with the *Lough* case in tracing the development of the dual-rate system. In the *Menacho* case there were no dual-rate exclusive patronage contracts. There was no factor of choice given to the shipper, since no contracts were made in advance. The only two steamship berth carriers in the trade between New York and Cuba carried cargo for the plaintiff shippers at a certain rate. When these carriers discovered that the plaintiff shippers had given some of their business to outside tramp carriers, they arbitrarily increased the rates demanded of the plaintiff although maintaining the previous rate for other shippers. The Court emphasized that the carriers would have been justified in charging a lower rate to shippers who agreed *in advance* to patronize the carriers exclusively. However, on the facts, the Court properly decided that the carriers were discriminating against the plaintiff shippers because of their patronizing an outsider under circumstances where the shippers had no advance opportunity of choice.

It is notable that in the *Menacho* case, the Court used strong language in condemning the practice of the carriers who were defendants before it. It stigmatized their rate practices as odious and discriminatory. Even so, it did not denominate the higher rates charged the non-conforming shippers as retaliatory.

We submit, however, that, accepting a very broad and general connotation of the word "retaliation", it might be possible to bring within its compass the practice set forth in *Menacho* v. *Ward*, where the higher rate was charged because of past shipments by outside carriers. There the shippers were not given the opportunity to obtain the lower rate by entering into *advance* agreements. The distinction between *Lough* and *Menacho* points out clearly the inappropriateness of treating as retaliation the *advance* provision for two scales of rates, the lower of which is accorded to contract shippers where the contract is made available to all, irrespective of previous shipments by non-conference lines.

(B) The Alexander Committee's Analysis of Conference Competitive Methods was Accepted by Congress and Reflected in the Shipping Act, 1916.

The Alexander Committee Report[2] is the authoritative guide to Congressional purpose when the Shipping Act was enacted in 1916.

The House of Representatives had directed the Committee on Merchant Marine & Fisheries to conduct a thorough investigation of steamship Conferences as early as 1912. During the intervening years the Committee conducted its inquiry in a methodical all-embracing fashion under the direction of Professor S. S. Huebner and a brilliant staff. The Committee laid the ground work for the investigation by issuing very extended inquiries to all of the public bodies and commercial and shipping organizations who could throw light on the problem. The experience of the then-leading maritime nation, Great Britain, was examined in detail by study of the "Report of the Royal Commission on Shipping Rings", (: Alexander Report 4). The British Commission had been appointed at an earlier time to consider market conditions, character and volume of traffic,

[2] H. R. Doc. 805, 63d Cong., 2d Sess. (1914).

and competitive shipping conditions on the various world trade routes and had brought in its report in 1909.

When the Alexander Committee published the results of its investigation, the Committee, in Volume 4 of its Report, set forth the overriding considerations which led to its recommendations (4 Alexander Report 415-417):

> "In formulating its recommendations it became apparent to the Committee, in view of all the facts presented, that only two courses of action were open for adoption. Either the agreements and understandings, now so universally used, may be prohibited with a view to attempting the restoration of unrestricted competition, or the same may be recognized along lines which would eliminate existing disadvantages and abuses * * *.
>
> "These advantages, the Committee believes, can be secured only by permitting the several lines in any given trade to co-operate through some form of rate and pooling arrangement under Government supervision and control. It is the view of the Committee that open competition cannot be assured for any length of time by ordering existing agreements terminated. The entire history of steamship agreements shows that in ocean commerce there is no happy medium between war and peace when several lines engage in the same trade. Most of the numerous agreements and conference arrangements discussed in the foregoing report were the outcome of rate wars, and represent a truce between the contending lines. *To terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership.* Neither result can be prevented by legislation, and *either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement.* Moreover, *steamship agreements and conferences are not confined to the lines engaging in*

the foreign trade of the United States. They are as universally used in the foreign trade of other countries as in our own. The merchants of these countries now enjoy the foregoing advantages of cooperative arrangements, and *to restore open and cutthroat competition among the lines serving the United States would place American exporters at a disadvantage in many markets* as compared with their foreign competitors." (Emphasis added.)

The Alexander Committee specifically found that there were beneficial results flowing from Conference operation. These could be summarized as follows: First, the noticeable improvement in service in those trades where Conferences had succeeded in stabilizing the rates and planning fixed sailing dates. Rate and service stability aided merchants in making forward contracts and eliminated the waste and confusion resulting from carriers' placing ships on berth indiscriminately.

Second, under Conference operation the carriers could obtain capital more readily, since investors could see some likelihood of a return on their investment flowing from a long-continued stable rate picture. The Committee's decision was that the advantages justified the continuance of Conference operation substantially as it had been practiced up to the time of the Report, under the watchful eye of a regulatory agency. Therefore, when Congress acted on the Committee's recommendation, it made a conscious choice for regulated monopoly which would be subject always to the control of the Government Board set up by Congress to administer the Shipping Act.

The Alexander Report indicated to Congress an awareness of the competitive methods pursued by Conferences operating in the United States and Great Britain prior to the time the Report was made. These Conferences had striven to protect themselves defensively from the tramp ships and outside lines mainly by use of the deferred rebate

and the dual-rate system. In this respect the Committee referred to the dual-rate contracts as follows in Volume 4, at page 290.

> (a) "*Joint contracts made by the Conference as a whole.* Such contracts are made for the account of all the lines in the agreement, each carrying its proportion of the contract freight as tendered from time to time. The contracting lines agree to furnish steamers at regular intervals and the shipper agrees to confine all shipments to conference steamers, and to announce the quantity of cargo to be shipped in ample time to allow for the proper supply of tonnage. The rates on such contracts are less than those specified in the regular tariff, but the lines generally pursue a policy of giving the small shipper the same contract rates as the large shippers, i.e. are willing at all times to contract with all shippers on the same terms."

The Committee was careful to point out that the dual-rate system gave the shipper a free election at all times. The Committee noted that the undesirable element of postponement which could be found in deferred rebate systems was not present in the dual-rate system. The contracts offered to the shippers today by the Conferences, parties to this brief, are in all essential respects similar to the joint contracts discussed by the Committee.

The Alexander Committee conscientiously explored for Congress in its Report the record made by the Interstate Commerce Commission in the thirty years since its inception to ascertain whether or not international shipping should be pressed into the strict regulatory mold already fashioned by the Interstate Commerce Commission for domestic carriage. The Committee urged Congress to discard this approach in favor of one which threw the burden of regulation onto the Conferences already in being. Congress, in enacting the Shipping Act, turned its back on the Interstate Commerce Commission pattern. There-

fore, the Shipping Act represents Congressional recognition that international shipping must exist in a delicate balance among the several sovereign governments involved. The United States wisely stayed its hand insofar as direct rate control was concerned and chose instead to throw the burden of regulation on the carriers of every country touching these shores through preserving the Conference method, subject to a regulatory board.

The language of Section 15 of the Shipping Act is not merely permissive but constitutes a directive to the Board to foster co-operative effort by the carriers. The Section provides that "the Board *may*, by order, disapprove, cancel or modify any agreement", which it finds to be unjustly discriminatory, or otherwise violative of the Shipping Act, but the latter part of the Section requires that the Board "*shall* approve all other agreements, modifications or cancellations". (emphasis added).

(C) Subsequent Congressional Consideration of Dual-Rate Systems Shows a Pattern Consistent with the Earlier Congressional Views.

Conferences in the United States trades continued to use the dual-rate systems in the years immediately following World War I. This use was, of course, subject to the regulation under which the Board administered the Shipping Act, 1916. During this period Congress dealt frequently with merchant shipping affairs in sweeping fashion. Hearings were held from which evolved the Merchant Marine Acts of 1920, 1928, and 1936. During this period many Conferences instituted the dual-rate system. There is every indication that immediately prior to World War II, a great majority of the Conferences embracing carriers in the foreign trade of the United States were using the system. In the *Handbook of Merchant Marine Development and Regulation in the United States*, published as Annex 2 of the *Report of The Inter-American*

Maritime Conference, there is a notation at page 38 to the following effect:

> "A study made by the Maritime Commission in 1938 revealed that a great majority of the Conferences established in the foreign trade of the United States employed the contract rate system, both as regards outward and inward services."

The above would indicate that when Congress was considering the Merchant Marine Act of 1936, and the amendments of 1938, the dual-rate system was in use by most Conferences. A study of the hearings during this period gives no indication of any Congressional move to change or outlaw the system.

In 1950, the Senate Committee on Interstate and Foreign Commerce grappled with shipping problems in comprehensive fashion. This Committee, when it issued its Report Number 2494, 81st Congress 2d Session, pointed up at pages 84 and 85, the corollation between the contract rate system and the desirable objective of rate stability.

Congress has in the years subsequent to World War I considered the essentials of the dual-rate system on several occasions, but has made no restrictive moves of any kind.

POINT II.

The court below erred in holding that Section 14 prevents the use of dual-rate systems.

The prohibitions of Section 14 were well-flagged and well-defined. Lest there be any question about the extent of the prohibitions, the draftsmen of the Shipping Act were very careful to spell out specifically those items which were forbidden. The first prohibition was that of the deferred rebate. This was a well-recognized method which had been evolved in England to meet competitive condi-

tions. The Act states exactly what is meant by deferred rebates, namely rebates in return for a period of exclusive patronage but payable at a time after the end of that period if, and only if, during the period of deferment the exclusive patronage had been continued.

The language of Section 14, First is so carefully drawn and so narrowly defines the prohibited practice that it does not proscribe discounts in consideration for exclusive patronage which are available to all shippers and which are to be paid promptly upon the completion of the service, regardless of whether or not the shipper enters into a new contract.

Section 14, Second makes illegal the fighting ship. This was a device well-known at the time of the adoption of the Shipping Act, 1916, which was clearly recognized as a vessel used to exclude competition by forcing another carrier out of the trade.

Section 14, Third, provides:

> "That no common carrier by water shall, directly or indirectly . . . Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available o esort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason."

The very way in which this paragraph is framed suggests that Congress wanted to insure the shipper a free choice uninhibited by a fear of reprisal by denial of common carrier facilities.

Analysis of the paragraph shows that insofar as the dual-rate system is concerned, there is no retaliation by refusal of space accommodations. The only part of the section in issue in this case is the prohibition of "resort to other discriminating or unfair methods, because such shipper has patronized any other carrier . . . or for any other

reason." It appears that the Court of Appeals has chosen to read this section of subdivision Third to prohibit the dual-rate system as retaliatory and as a discriminating method. In so doing, the Court has written its own unique description of retaliation and has stripped the word of its accepted meaning. Further, it has read into this subdivision a reference to rate activity which does not appear in the statutory language.

The Court of Appeals' approach in the opinion below is that retaliation springs from the mere differentiation in rates between those shippers who do and those who do not agree to give Conference vessels their cargoes. The Court also found an element of retaliation in a provision for liquidated damages to make the carriers whole when, as, and if the shipper breaches the agreement.

In the opinion below the Court of Appeals decided that, despite the plain meaning of the contract setting forth the right to a lower rate for the shipper willing to contract with the member lines in advance, such contract constitutes retaliation because it is primarily aimed at keeping the shipper from giving his patronage to an outside carrier. To reach this decision the Court, in effect, makes a new contract for the parties, different in character and scope from the one for which they bargained. The Court finds support for its argument in the unwarranted assumption that contracts are only an insignificant incident in the steamship industry. This is an unrealistic attitude which completely overlooks the fact that a great part of the steamship business is concerned with contracts of one kind or another. Shippers and steamship companies are constantly making contracts in the form of booking agreements, bills of lading, mate's receipts, and a myriad of other documents needed to define clearly the changing relation of the parties in an essentially dynamic situation. The implication in the decision that the contract is a mere sham is very much at variance with the facts.

The Court of Appeals goes even further in making an additional finding that the carriers' insistence upon a contract in return for lower rates is retaliation even as against a shipper prepared to confine all of his cargo offerings to the Conference carriers, but not prepared to sign a contract for any one of a number of valid reasons. Even on the incorrect assumption that Section 14, Third has any bearing on rates, reasoning of this sort rules out incentive rates of any kind.

The Court of Appeals' rationale in this case is to be contrasted with that of the Board and other Courts which have examined the subject matter both prior and subsequent to the Shipping Act, 1916. The Courts and the Board have considered the dual-rate scale merely to be the making available of a discount to shippers willing to contract in advance to use the member lines of the Conference exclusively. The non-contract rate is charged to all other shippers *whether or not they confine their shipments to Conference members or go outside the Conference.* In their view, such a dual scale is neither an act of retaliation nor is it an "other discriminating or unfair method" within the meaning of Section 14, Third. As the Board has said in this case, retaliation is a powerful word, which by its very nature connotes vengeance or evil. Certainly, the adoption of a dual-rate system under circumstances where the shipper is perfectly free to agree to or decline to give his exclusive patronage to a group of water carriers hardly suggests the vengeful or punitive conduct of the type at which Congress directed Section 14, Third.

The argument has been mistakenly made that the mere charging of a higher rate to a shipper who does not want to be bound is an "other discriminating or unfair method". However, if the Shipping Act as a whole is read, it is apparent that the word "unjustly" should be considered as modifying the words "discriminating or unfair method".

Any other interpretation of this clause does violence to the Shipping Act as a whole.

Section 14, Fourth proscribes contracts which are *unjustly* discriminatory against shippers because of the volume of freight offered. The only sub-section of Section 14 mentioning contracts as such in any way, sub-section Fourth also prohibits certain practices with regard to space accommodations, loadings, landings, and claims adjustments which *unjustly* discriminate against any shipper.

When Section 15 of the Act is examined, it appears that the only discriminatory agreements condemned therein are those which are *unjustly* discriminatory. So too, under Section 16, Second, carriers are forbidden to allow shippers to obtain transportation at less than the regular rates or charges * * * by any other *unjust* or *unfair* device or means.

In Section 16. First, the language forbids carriers to confer *undue* or *unreasonable* preferences or to subject such shippers or traffic to *undue* or *unreasonable* prejudices.

Section 17, although slightly different in terminology from Section 16, forbids carriers to assess rates or fares which are *unjustly* discriminatory or *unjustly* prejudicial to enumerated persons. The uniform Congressional purpose which permeates the Shipping Act has been to guarantee, not that all preferences and discrimination be prohibited, but merely that the preference and discrimination which the Board finds to be *unfair, unreasonable or unjust* shall be forbidden.

Those who state that the dual scale of rates is retaliatory are victims of a serious misconception when they argue that the shipper is being retaliated against because he is using a carrier not a member of the Conference. This is simply not the fact. The difference between the two positions is much more than a mere exercise in semantics because, far from being retaliatory, the contract gives the shipper the right to make a conscious, willed decision. If the shipper wants to take advantage of the lower rate,

he must take stock of his position and must make the decision *in advance* to ship all of his goods on one or another of the Conference carriers. The carriers collectively are prepared to give an inducement to the shipper for signing such a contract. Proof of the lack of retaliation is the fact that even if the shipper should, in fact, ship all of his cargo during a given period by Conference vessel, he will nevertheless be required to pay the higher rate, unless he has executed the contract. Therefore, the non-signing shipper who patronizes the Conference exclusively is in exactly the same position as the non-signing shipper who patronizes the Conference and outside lines. From the point of view of the Conference, there is no difference between the non-signing shipper who patronizes the Conference exclusively and the one who uses both Conference and outside lines, because neither can be counted upon during any given period. The importance to the Conference of a shipper who has signed the contract is that the carriers, in reliance thereon, are able to project their plans and to space their sailings, secure in the knowledge that whatever freight the signatory shipper has will move over the Conference lines.

If there is any difference in treatment, it springs from the shipper's failure to make a decision as to whether or not he wants to give advance notice of his wishes to the carriers. No one appears to be shocked in the slightest at the idea that committees running public events give the patrons a conscious choice as to whether they want to retain their freedom of action up to the last minute and pay one price "at the door" or to send in their checks in advance at a lower price. Nor is anyone shocked at law book publishers whose practice it is to sell individual books or a multi-volume series at one price to those who agree in advance to buy the books or the series, and at another and higher price to those who do not agree in advance to make their purchases—those who are willing to pay for the

privilege of seeing how the books are received and what critical acclaim they obtain.

These examples are not, of course, four-square with the Conferences' contract, non-contract rate systems. In neither example, however, would reasonable people in their ordinary usage of the word say that buyers who had not agreed to make their purchases in advance, were the victims of "retaliation" at the hands of sellers who were willing to offer a discount for the benefits to them that came from advance planning.

According to the reasoning of the Court of Appeals, sellers would be retaliating against those people who insisted upon maintaining their freedom of choice until the last minute when they asked for ten per cent more in return for the maintenance of that freedom. It is patently obvious that a reasonable reduction is a fair and proper inducement to persuade people to make up their minds and to make commitments in advance. Such a discount can be measured against the enhanced certainty in planning and in the forestalling of waste which results when management knows in advance what commitments it must make.

Absent a special contract, the carriers generally cannot expect to secure the exclusive patronage of a shipper. However, the carriers are justified in relying on the shipper's agreement for exclusive patronage over a given period when such an agreement is lawfully entered into *in advance*. In return for the benefit derived by the carriers from the shipper's agreement, the carriers can reasonably offer some inducement in the form of a lower rate.

In *United States* v. *Prince Line*, 220 Fed. 230, 234 (S. D. N. Y., 1915), reversed as moot in 242 U. S. 537 (1917), the District Court undertook to spell out the business necessity for an exclusive patronage arrangement in the following language:

> "* * * A line providing regular sailings and undertaking to furnish sufficient space will presum-

ably learn by experience enough of conditions at the several ports at different seasons to enable it to calculate with reasonable accuracy what amount of cargo it may expect from its shippers for any particular sailing. Making provision accordingly, the vessel sailing will take her departure with substantially a full cargo. But if, when she reaches port, it is discovered that the calculations as to expected cargo were correct, but that some of her largest regular shippers had sent their merchandise off the week before by some tramp steamer, the regular vessel will have to sail with much unfilled cargo space. A few experiences of this sort might well involve a loss equal to, if not in excess of, the ten per cent * * *."

Under the theory advanced by those who claim that the dual-rate system is retaliatory, the contract signed by a shipper because of the attraction of cheaper rates is a contract which is grounded in force. The opponents of the system also assert that the shipper is, practically speaking, the victim of his own cupidity. This argument is unsound because the shipper who exercises a conscious choice to sign an exclusive contract in return for a lower rate scale is no more coerced than any other party to a contract who before entering into the contract weighs its benefits against its known burdens. Any shipper acting in good faith knows that he must assume some handicaps in the form of a restriction of choice when he makes a contract of any sort. In this sense the exclusive patronage dual-rate system is no different from any other contractual arrangement.

POINT III.

The decision of the Court of Appeals is in conflict with prior decisions of this Court.

While the Court below specifically conceded that the courts in prior decisions have not considered the dual-rate

system invalid *per se*, "otherwise the courts would have disposed of these cases on that ground", *Isbrandtsen Company, Inc.* v. *United States*, 239 F. 2d 933, 938 (C. A. D. C., 1956), it erred when it determined that prior cases had not decided the point. The decision below is in direct conflict with the language of this Court in *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474 (1932).

In the *U. S. Navigation* case, *supra*, this Court specifically considered the contention that the dual-rate system involved in that case was unlawful *per se*. This Court in rejecting that contention, at pages 485, 487, said:

> "The * * * [Shipping Act] is restrictive in its operation upon some of the activities of common carriers by water, and permissive in respect of others. Their business involves questions of an exceptional character, the solution of which may call for the exercise of a high degree of expert and technical knowledge. Whether a given agreement among such carriers should be held to contravene the act may depend upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions in respect of the shipping of foreign countries, and of other relevant circumstances, generally unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade; and with which that body, consequently, is better able to deal. (Cases cited.)
>
> * * * * * *
>
> "* * * Moreover, having regard to the peculiar nature of ocean traffic, it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications."

In *Far East Conference* v. *United States*, 342 U. S. 570 (1952), the argument was made most forcefully by the

Government that the dual-rate system involved in that case was unlawful *per se*. This Court reaffirmed the holding of *U. S. Navigation Co.* v. *Cunard S. S. Co., supra,* to the effect that the matter was one of primary administrative jurisdiction and that it was for the Board to make the factual determination as to whether or not a dual-rate system could be legal. The dissenting opinion in the case considered the dual-rate system to be illegal *per se* under Section 14, Third of the Shipping Act.

In addition, had this Court been of the opinion in the *U. S. Navigation* case, *supra,* that a dual-rate system was illegal *per se,* no purpose whatsoever would have been served by referring the controversy back to the Board if it had no statutory authority to permit the acts charged to the Conference lines. *Skinner & Eddy Corp.* v. *United States,* 249 U. S. 557, 562 (1919); *Pennsylvania R. R. Co.* v. *International Coal Mining Co.,* 230 U. S. 184, 197 (1913). It would not have been a proper case for the application of the primary administrative jurisdiction rule because only a question of law would have been involved. *Great Northern Railway Co.* v. *Merchants Elevator Co.,* 259 U. S. 285 (1922); *River Plate and Brazil Conferences* v. *Pressed Steel Car Co.,* 227 F. 2d 60 (C. A. 2, 1955).

Once against in *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297 (1937), this Court recognized that dual-rate systems do not *per se* violate the Shipping Act. The Court in a footnote to that opinion, at page 307, said:

> "The report of the House Committee on Merchant Marine & Fisheries, H. R. Doc. 805, 63rd Cong., 2d Sess. (1914), recommended (p. 307) the prohibition of deferred rebates, adopted in § 14 of the Shipping Act, because it operated to tie shippers to a group of lines for successive periods, and because the system 'is unnecessary to secure excellence and regularity of service, a considerable number of conferences being operated today without this feature.' See, e.g., pages 103-105, 200. The Committe recog-

nized that the exclusive contract system does not necessarily tie up the shipper as completely as 'deferred rebates,' since it does not place him in 'continual dependence' on the carrier by forcing his exclusive patronage for one contract period under threats of forfeit of differentials accumulated during a previous contract period. Accordingly the Committee did not condemn the contract system completely. Cf. *W. T. Rawleigh Co.* v. *Stoomvaart*, 1 U. S. S. B. 285. The policy of the statute may properly be applied where, as in the circumstances of this case, the contract system must be taken as actually operating to effect a monopoly. Cf. *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, 1 U. S. S. B. 41."

By pointing out that the Board had jurisdiction to pass upon dual-rate systems under the Shipping Act, we submit this Court has recognized that such systems are not illegal *per se* under Section 14, Third of the Shipping Act.

The decision of the Court below directly conflicts with *Swayne & Hoyt* v. *United States, supra,* by failing to recognize that the Board has jurisdiction to determine whether a particular dual-rate system is justifiable.

POINT IV.

Failure to reverse the Court of Appeals would adversely affect the public interest.

The fundamental question before this Court involves matters of the greatest economic consequence to the nation. Should the decision of the Court of Appeals be affirmed, the foreign commerce of the United States and the Government's capacity to carry forward many major national policy objectives may be seriously impaired. Ocean carrier operations serve the public interest in many ways. Foreign commerce comprises a substantial portion of the national

economy, directly or indirectly affecting the employment of millions of Americans. In order to appreciate this, the importance of the dual-rate contract system to the functioning of steamship conferences and to world shipping must first be fully understood.

We submit that the disastrous economic effects that a decision against the dual-rate contract system would inevitably have on ocean transportation and the consequent disruption of that industry are such vital considerations in this case that the Court should hesitate before handing down such a decision in the face of long established administrative construction of a statute now some forty-one years old.

Certain fundamental conditions are well established among students of transportation economics and history as essential to promotion of trade and commerce. Summarily stated, these conditions are four in number: (1) stability of rates; (2) regularity of sailings and service; (3) financially responsible carriers; and (4) the absence of unjustifiable discriminations between shippers and of clandestine rebates or kickbacks.

Stability of rates, that is, the absence of frequently fluctuating rates and the capability of affording shippers reasonable assurance as to what a particular rate will be at the time a sale is consummated, is the most important single element involved. Without rate stability the other requirements cannot be achieved. This point was emphasized by the United States Delegation to the Inter-American Maritime Conference of 1940 which reported as follows:

> "* * * The experience of the past has shown that lines operating without conference agreements or other stabilizing influences will inevitably engage in rate wars which are harmful to trade and destructive of services. The inherent difficulties of regulating an international business such as shipping makes the conference system of self-regulation an acceptable

substitute for rigid governmental control of ocean rates. The continuance of the system is considered important if carriers are to maintain, improve, and perpetuate the regular, frequent, fast, and dependable service which is necessary to the continued growth of inter-American commerce." *Report of the Inter-American Maritime Conference*, page 144.

The basic fact of ocean transportation economics is that a system of unregulated competition dependent solely upon the operation of the forces of supply and demand does not function in the ocean transport industry. Historically the choice has been between the Conference system of self-regulation on the one hand and destructive cutthroat competition on the other. The disastrous consequences to carriers and shippers alike of the rate wars of the 1920's and the continued depressed rate levels of the 1930's attest to the unwholesome result of unrestricted competition outside the Conference system.

The operating costs of a half-empty vessel are not commensurably less than those of a vessel with a full cargo. In a system of uncontrolled competition each carrier is therefore subject to unrelenting pressure to cut prices and attract business. The invariable end product is rate wars. American flag operators, because of high labor costs, would necessarily be the first to suffer. Smaller carriers may face immediate bankruptcy. The effect of the foregoing is disruption of cargo movement and a decrease in this country's trade. This was recognized by the United States Delegates to the Inter-American Maritime Conference of 1940 who stated:

"* * * Merchants in great numbers informed the Government that they considered the conference system was necessary to assure them the stability of rates and the regular and dependable ocean transportation services which they required. * * *" *Report of Inter-American Maritime Conference*, page 150.

More recently, essentially the same conclusion was reported by the Senate Committee on Interstate and Foreign Commerce:

> "The small export shipper has been vociferous in the defense of the contract rate system, as it has enabled him to get equal rate treatment and thereby compete successfully in world markets with the large shippers." Senate Report No. 2494, 81st Congress, 2nd Session, page 85.

The Senate Committee found, in comparing rates of the period encompassing World War I to World War II, that the dual-rate system had in fact resulted in sensible control of rates in time of shipping shortage and had prevented fatal rate-cutting in time of overtonnage. Noting that the dual-rate system was under attack in the courts, the Committee nonetheless decided that the dual-rate system "appear[s] to be in the public interest" (p. 85). The decision of the Court of Appeals, if permitted to stand, would cripple the Conference system in its objective of rate stability.

In some other parts of the world, shipping Conferences protect themselves against rate warfare by the medium of the "deferred rebate" system, unlawful in the United States. In the United States a stable rate structure has been made possible in most trades by some form of the dual-rate contract.

The Conference system and the determination of rates by it is not peculiar to the ocean transportation industry. Basically the same method of rate determination is used by railroads, motor carriers, air lines, and ships in coastal trades, all of which determine their rates as groups. Similarly, they too operate under wide areas of exemption from the anti-trust laws.

The recurrent pattern of uncontrolled competition in the transportation industry leads invariably to destructive rate wars, inflicts heavy losses on carriers, shippers,

and the public, and is especially apt to present itself in the area of foreign transport. Congress has recognized, however that, whereas the competitive problems of this industry are analogous to those of railroading and coastwise shipping, a system of unilateral imposition of rates by any single government does not and cannot offer a practical solution. Secretary of State Cordell Hull explained the difficulty of unilateral national control to the delegates of the Inter-American Maritime Conference as follows:

> "In my opinion, a most serious objection to any unilateral attempt by this Government to fix rates in foreign commerce lies in the fact that this procedure would add one more form of restriction to the entangled and conflicting mass of nationalistic restrictions from which our foreign trade is suffering today. The impracticability of such unilateral regulation can readily be appreciated if one considers the impasse that would result if another government should adopt the same practice, but should prescribe rates covering its trade with us differing from those our authorities prescribed for the very same trade." *Report of the Inter-American Maritime Conference*, page 467.

The international steamship Conferences were established to provide for the industry a plan of voluntary self-regulation as the only practicable means of providing rate stability, regularly scheduled service, financially responsible carriers, and of eliminating unjust discrimination between shippers. Admission to Conference membership is freely available to any carrier wishing to obtain the benefits of Conference contracts. The Shipping Act, 1916, expressly recognized and explicitly sanctioned the Conference system. However, by requiring administrative approval of all Conference agreements and authorizing modification or subsequent cancellation of such agreements, the Act substantially strengthened the Conference structure by providing the means for governmental protection of the

public interest. Thus, in the case of an attempt by carriers to impose unreasonable regulations, effective administrative sactions have been provided.

The economic pressures which necessitated the institution of dual-rate systems by Conferences in the first two decades of this century have increased in the interim to the extent that today the continuance of the systems is essential for a healthy merchant marine and for adequate service in foreign commerce.

During the last thirty years there has been a marked increase in the average size of ships used in foreign commerce. Meanwhile, labor, manning, and port charges have risen astronomically. This combination of factors has resulted in such heavy, fixed costs that the Conference carriers must have some assurance of a minimum amount of cargo when they put their ships on the berth. It only takes a very few light sailings to cause serious economic distress to these carriers.

The availability of a pool of ships built during World War II has made it possible for marginal operators to skim the cream of a seasonal trade with chartered ships during the heavy shipping season. Later during the lighter shipping season, these predatory operators retire. Unless the Conference carriers can obtain satisfactory commitments from shippers in return for their own commitments to put the necessary tonnage into the trade, they must necessarily always be in doubt as to whether or not there will be sufficient cargo available to fill their large ships at sailing time. The assurance of a regular flow of cargo is a minimum requirement before the steamship operators can afford to risk the loss. When the dual-rate system is used, member lines can project traffic trends and make intelligent forecasts as to the cargo that will be offered to the group of ships by the shippers. The system gives the Conference carriers the knowledge to space sailings properly and provide ships of a proper size and design for the

trade. The Conference carriers, secure in the knowledge that they will obtain whatever cargo the signatory shippers forward in the trade, can with propriety invest the money needed to specialize or redesign their ships.

In order to enable shippers to make forward commitments, which are so very important in foreign trade, the Conferences guarantee that their rates will not be increased during the contract period, except after substantial periods of notice of intent to increase a certain rate, ranging up to 180 days. If a shipper does not approve of the increase, effective at the end of the notice period, then under the escape clause he may without restriction terminate his contract. On the other hand, if the Conferences make reductions in their rates, the shipper automatically receives the benefit of such reductions. Thus, a shipper in international trade is assured of stable transportation cost when he negotiates for foreign markets.

The opinion below, if upheld, will perforce destroy trading relationships pursued throughout the world by shippers who have dealt for many years with the Conferences, parties to this brief. In areas which have previously known quiet and reasonably stable ocean freight rates, we can only anticipate a return to the law of the jungle. The international trading relationships which have flourished under dual-rate systems in which shippers could make forward commitments, will almost certainly be set back, since thereafter every sale involving future delivery will be subject to unpredictable variation in freight rates.

Conclusion.

The Shipping Act was aimed at protecting American shipping and commerce from the severe blood-letting which has traditionally characterized rate wars on the high seas. The Conferences, the Association, and the carrier member lines thereof urge that the decision of the Court of Appeals

be reversed because that opinion is based on less than an adequate understanding of the basic purpose inherent in the Shipping Act, 1916.

We request that the decision of the Court of Appeals be reversed.

Respectfully submitted.

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APPENDIX A

STEAMSHIP CONFERENCES

Associated Steamship Lines (Manila)
Atlantic and Gulf-Indonesia Conference
Atlantic and Gulf/Panama Canal Zone, Colon and Panama City Conference
Atlantic and Gulf-Singapore, Malaya and Thailand Conference
Atlantic and Gulf/West Coast of Central America and Mexico Conference
Atlantic and Gulf/West Coast of South America Conference
Brazil/United States-Canada Freight Conference
Calcutta/U. S. A. Conference
Deli/New York Rate Agreement
East Coast Colombia Conference
East Coast South America Reefer Conference
Far East Conference
Gulf/French Atlantic Hamburg Range Freight Conference
Gulf/Mediterranean Ports Conference
Gulf/United Kingdom Conference
Havana Northbound Conference
Havana Steamship Conference
India, Pakistan, Ceylon & Burma Outward Freight Conference
Java-New York Rate Agreement
Leeward & Windward Islands & Guianas Conference
Mid Brazil/United States-Canada Freight Conference
New York Freight Bureau (Hong Kong)
North Brazil/United States-Canada Freight Conference
Pacific Indonesian Conference
Pacific Straits Conference
Pacific Westbound Conference
River Plate and Brazil Conference
River Plate/United States-Canada Freight Conference
Santiago de Cuba Conference
Straits/New York Conference
U. S. Atlantic and Gulf/Australia-New Zealand Conference
U. S. Atlantic & Gulf Ports-Jamaica (B. W. I.) S. S. Conference

U. S. Atlantic & Gulf-Venezuela and Netherlands Antilles Conference
United States Atlantic & Gulf-Haiti Conference
West Coast South America Northbound Conference
Pacific American Steamship Association*

THE FOLLOWING COMMON CARRIER STEAMSHIP LINES ARE MEMBERS OF ONE OR MORE OF THE FOREGOING CONFERENCES:

Aktieselskabet Atlas
Aktiebolaget Svenska Amerika Linien
Alcoa Steamship Company, Inc.
American Export Lines, Inc.
American Mail Line, Ltd.
Angfartygsaktiebolaget Tirfing
Armement Deppe, S.A.
A/S Atlantica
A/S J. Ludwig Mowinckels Rederi
Atlantic Ocean Transport Corporation
Bloomfield Shipping Company
Booth American Shipping Corporation
Buccaneer Line, Inc.
Cia. Argentina de Navegacion Dodero
Compagnie de Transports Oceaniques
Compagnie Generale Transatlantique
Compagnie Maritime Belge, S.A.
Compagnie Maritime Congolaise, S.C.R.L.
Compania Colombiana de Navegacion Maritima
Compania de Navegacion Dalpha, S.A.
Compania Maritima del Nervion
Compania Naviera Cubamar, S.A.
Compania Sud Americana de Vapores
Compania Transatlantica Espanola, S.A.
Dampskibsaktieselskabet Alaska
Dampskibsaktieselskabet Golden Gate
Dampskibsaktieselskabet Idaho
Dampskibsaktieselskabet Jeanette Skinner

* Association of United States steamship lines operating from the west coast of the United States.

Damps' ibsaktieselskabet Lisbeth
Dampskibsselskabet Torm
Deutsche Dampfschiffahrts-Gesellschaft "Hansa" Bren
Germany
Dovar S.A. International Shipping & Trading Co.
Eckert Steamship Corp.
Ellerman Lines, Ltd.
Ellerman & Bucknall Steamship Co., Ltd.
Federal Steam Navigation Co., Ltd.
Flota Mercante del Estado
Flota Mercante Grancolombiana, S.A.
Grace Line, Inc.
Gulf & South American Steamship Co., Inc.
Hall Line, Ltd.
Hamburg Amerika Linie
Hamburg-Suedamerikanische Dampfschiffahrts
Gesellschaft Eggert & Amsinck
Hellenic Lines Limited
Hugso Stinnes O. H. "Brenntag", Brennstoff-,
Chemikalien-und Transport, G.m.b.H.
Hvalfangstaktieselskapet Suderoy
Isthmian Lines, Inc.
Israel America Line, Ltd.
Khedival Mail Line, S.A.E.
Koninklijke Rotterdamsche Lloyd, N.V.
Lamport & Holt Line, Ltd.
Larrinaga Steamship Co., Ltd.
Lloyd Brasileiro
Marina Mercante Nicaraguense, S.A.
Matson Navigation Company
M. Dizengoff & Co. (Shipping) 1949, Ltd.
M. Dizengoff & Co. (Navigation) 1951, Ltd.
Mississippi Shipping Co., Inc.
Moore-McCormack Lines, Inc.
Naviera Vacuba, S.A.
Navigazione Alta Italia-Genoa
New Zealand Shipping Co. Ltd.
Norddeutscher Lloyd
North Atlantic & Gulf Steamship Company, Inc.
Nitto Shosen Co. Ltd.
N. V. Koninklijke Paketvaart Maatschappij

N. V. Nederlandsch-Amerikaansche Stoomvart-Maatschappij-"Holland-Amerika Lijn"
N. V. Stoomvart Maatschappij "Nederland"
Ozean Linie G.m.b.H.
Pacific Far East Line, Inc.
Pacific Transport Lines, Inc.
Panama Canal Company
Philippine National Lines
Port and Associated Lines
Prince Line, Ltd.
Prudential Steamship Corporation
Rederiaktiebolaget Disa
Rederiaktiebolaget Fredrika
Rederiaktiebolaget Poseidon
Rederiaktiebolaget Svenska Lloyd
Royal Netherlands Steamship Company
Skibsaktieselskapet Abaco
Skibsaktieselskapet Arizona
Skibsaktieselskapet Aruba
Skibsaktieselskapet Astrea
Skibsaktieselskapet Marie Bakke
Skibsaktieselskapet Noruega
Skibsaktieselskapet Ogeka
Skibsaktieselskapet Pacific
Skipsaksjeselskapet Hilda Knudsen
Skipsaksjeselskapet Samuel Bakke
Skipsaktieselskapet Kirkoy
Skipsaktieselskapet Nordheim
Skipsaktieselskapet Skagerak
Skipsaktieselskapet Vito
States Steamship Company
Stockard Steamship Corporation
Stockholms Rederiaktiebolag Svea
The Bank Line Limited
The Booth Steamship Co., Ltd.
The City Line, Ltd.
The Cunard Steam-Ship Company Ltd.
The East Asiatic Company, Ltd.
The Northern Pan-America Line, A/S
Thos. and Jas. Harrison, Ltd.
Thos. & Jno. Brocklebank, Ltd.

Three Bays Corp., Ltd.
United Fruit Company
Van Nievelt, Goudriaan & Co.'s Stoomvaart Maatschappij N.V.
Victorias Milling Company, Inc.
Ward Garcia, S.A.
West Coast Line
Westfal-Larsen & Co., A/S
Westley Shipping Co., Inc.
Zim Israel Navigation Co., Ltd.

Certificate

I, John R. Mahoney, Counsel for the *amici curiae* in Appendix A of the foregoing Brief, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of August, 1957, I served copies of the foregoing Motion to file Brief and Brief *Amicus Curiae* on counsel for all parties of record by mailing copies to their offices in duly addressed envelopes with postage prepaid.

.....

John R. Mahoney

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FEB 1 1957
JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1956

NO. ~~746~~ 74

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE; MITSUI STEAMSHIP CO., LTD.; KAWASAKI KISEN KAISHA; NISSAN KISEN KAISHA, LTD.; TOHO KAIUN KAISHA, LTD.; IINO KAIUN KAISHA, LTD.; MITSUBISHI KAIUN KAISHA, LTD.; KOKUSAI KAIUN KAISHA, LTD.; NIPPON YUSEN KAISHA; OSAKA SHOSEN KAISHA, LTD.; SHINNIHON STEAMSHIP CO., LTD.; YAMASHITA KISEN KAISHA; WILHELMSENS DAMPSKIBSAKTIESELSKAB; A/S DEN NORSKE AFRIKA-OG AUSTRALIELINIE; A/S TONSBERG; A/S TANKFART I; A/S TANKFART IV; A/S TANKFART V; A/S TANKFART VI; SKIBSAKTIESELSKABET VARILD; SKIBSAKTIESELSKAPET MARINA; AKTIESELSKABET GLITTRE; DAMPSKIBSINTERESSENTSKABET GARONNE; SKIBSAKTIESELSKAPET SANGSTAD; SKIBSAKTIESELSKAPET SOLSTAD; SKIBSAKTIESELSKAPET SILJESTAD; DAMPSKIBSAKTIESELSKABET INTERNATIONAL; SKIBSAKTIESELSKAPET MANDEVILLE; SKIBSAKTIESELSKAPET GOODWILL; DAMPSKIBSSELSKABET AF 1912 AKTIESELSKAB; AKTIESELSKABET DAMPSKIBSSELSKABET SVENDBORG; SKIBSAKTIESELSKAPET IGADI; A/S BESCO; AKTIESELSKAPET IVARANS REDERI; A/S JASE; THE DE LA RAMA STEAMSHIP CO., INC.; THE OCEAN STEAM SHIP CO., LTD.; THE CHINA MUTUAL STEAM NAVIGATION COMPANY, LTD.; NEDERLANDSCHE STOOMVAART MAATSCHAPPIJ "OCEAAN" N. V.; THE SWEDISH EAST ASIA CO., LTD.; WATERMAN STEAMSHIP CORPORATION; LYKES BROS. STEAMSHIP CO., INC.; UNITED STATES LINES COMPANY; STATES MARINE CORPORATION; STATES MARINE CORPORATION OF DELAWARE; DAIDO KAIUN KAISHA; AMERICAN PRESIDENT LINES, LTD.,

Petitioners,

—against—

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, ISBRANDTSEN COMPANY, INC., and EZRA TAFT BENSON, Secretary of Agriculture,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Intercoastal Shipping Act, 1933, Mar. 3, 1933, c. 199, 47 Stat. 1425, 46 U. S. C. Sec. 843, *et seq.* 17

Review of Orders of Federal Agencies Act of Dec. 29, 1950, c. 1189, Pub. L. No. 901, 81st Cong., 2d Sess., 64 Stat. 1129, 5 U. S. C. Sec. 1031, *et seq.* (Hobbs Act) 8

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Revision of Title 28, Judiciary and Judicial Procedure, June 25, 1948, c. 646, 62 Stat. 928, 28 U. S. C. Sec. 1254 (1) 2

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Shipping Act, 1916, Sept. 7, 1916, c. 451, 39 Stat. 728, as amended, 46 U. S. C. Sec. 801, *et seq.* 14

Sec. 14 (46 U. S. C. Sec. 812), 3, 9, 12, 13, 16, 17-19, 20-24

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Sec. 17 (46 U. S. C. Sec. 816) 22

Miscellaneous:

Federal Maritime Board General Order 76, 17 F. R. 10175, 46 C. F. R. Sec. 236.1, *et seq.*, Sec. 236.3 6

H. R. Doc. 805, 63d Cong., 2d Sess. (1914) (Alexander Committee Report) 23-25

Proceedings of the House Committee on the Merchant Marine and Fisheries, 62d Cong., 2d Sess., Vols. I and II (1913) 24

Rules of the Supreme Court of the United States of America, Rule 19, par. 1(b), 28 U. S. C. A. 15

Rules of the United States Court of Appeals for the District of Columbia Circuit, Rule 38(a), 28 U. S. C. A. 8

Supreme Court of the United States

OCTOBER TERM, 1956

No.

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE; MITSUI STEAMSHIP CO., LTD.; KAWASAKI KISEN KAISHA; NISSAN KISEN KAISHA, LTD.; TOHO KAIUN KAISHA, LTD.; JINO KAIUN KAISHA, LTD.; MITSUBISHI KAIUN KAISHA, LTD.; KOKUSAI KAIUN KAISHA, LTD.; NIPPON YUSEN KAISHA; OSAKA SHOSEN KAISHA, LTD.; SHINNIHON STEAMSHIP CO., LTD.; YAMASHITA KISEN KAISHA; WILHELMSENS DAMPSKIBSAKTIESELSKAB; A/S DEN NORSKE AFRIKA-OG AUSTRALIELINIE; A/S TONSBERG; A/S TANKFART I; A/S TANKFART IV; A/S TANKFART V; A/S TANKFART VI; SKIBSAKTIESELSKAPET VARILD; SKIBSAKTIESELSKAPET MARINA; AKTIESELSKABET GLITTRE; DAMPSKIBSINTERESSENTSKABET GARONNE; SKIBSAKTIESELSKAPET SANGSTAD; SKIBSAKTIESELSKAPET SOLSTAD; SKIBSAKTIESELSKAPET SILJESTAD; DAMPSKIBSAKTIESELSKABET INTERNATIONAL; SKIBSAKTIESELSKAPET MANDEVILLE; SKIBSAKTIESELSKAPET GOODWILL; DAMPSKIBSSELSKABET AF 1912 AKTIESELSKAB; AKTIESELSKABET DAMPSKIBSSELSKABET SYENDBORG; SKIBSAKTIESELSKAPET IGADI; A/S BESCO; AKTIESELSKAPET IVARANS REDERI; A/S LISE; THE DE LA RAMA STEAMSHIP CO., INC.; THE OCEAN STEAM SHIP CO., LTD.; THE CHINA MUTUAL STEAM NAVIGATION COMPANY, LTD.; NEDERLANDSCHE STOOMVAART MAATSCHAPPIJ "OCEAAN" N. V.; THE SWEDISH EAST ASIA CO., LTD.; WATERMAN STEAMSHIP CORPORATION; LYKES BROS. STEAMSHIP CO., INC.; UNITED STATES LINES COMPANY; STATES MARINE CORPORATION; STATES MARINE CORPORATION OF DELAWARE; DAIDO KAIUN KAISHA; AMERICAN PRESIDENT LINES, LTD.,

Petitioners,

—against—

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, ISBRANDTSEN COMPANY, INC., and EZRA TAFT BENSON, Secretary of Agriculture,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners herein, the Japan-Atlantic and Gulf Freight Conference and its seventeen member lines, respectfully pray for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit to review a judgment of that court.

Opinion Below

The majority and concurring opinions of the court below (R. 236-50) have not yet been officially reported. They are printed in Appendix B hereto.

Jurisdiction

The jurisdiction of this Court is invoked under 5 U. S. C. § 1040 and 28 U. S. C. § 1254 (1).

The petition is timely, the judgment below having been entered on November 9, 1956.

Question Presented

The Board,[1] after extensive hearings and exhaustion of intermediate procedures, entered an order, pursuant to § 15 of the Shipping Act, 1916, 46 U. S. C. § 814, approving an agreement among the Con-

[1] The Federal Maritime Board and its predecessor agencies which have from time to time administered the Shipping Act are herein referred to as "the Board."

ference Members, common carriers by water in foreign commerce, to institute a dual-rate system under which they would establish one level of rates for shippers who sign contracts to ship by petitioners exclusively and another level of rates 9½ percent higher for shippers who do not sign such contracts. The Board found that, in the interests of shippers and carriers alike, the system agreed upon was necessary to preserve rate stability and avoid destructive rate wars; and that the system would not be monopolistic in its effect. The Court of Appeals set this order aside on the ground that the dual-rate system, despite these findings, is illegal *per se* under § 14, Third of the Shipping Act.

The question presented is whether such a dual-rate system is illegal *per se* under § 14, Third of the Shipping Act, 1916, 46 U. S. C. § 812, with the result that the Board is without power to approve, under § 15 of that Act, an agreement among such common carriers to use such a system.

Statute Involved

The statutory provisions involved, §§ 14 and 15 of the Shipping Act, 1916, 39 Stat. 733, as amended, 46 U. S. C. §§ 812, 814,[2] are printed in Appendix A hereto together with the other pertinent sections of the Act, particularly § 16 thereof.

[2] Sections 14 and 15, which are above mentioned with their official citations, constitute the principal subject matter of this controversy and are so frequently referred to that we shall designate them merely § 14 or § 15, as the case may be. As to all other statutory citations, U. S. C. references will be given and the official citations may be found in the table of authorities. References to the certified transcript of the Record filed with this Court are given as "(R.)"; and references to the Appendices hereto as "(App. , p.)."

Statement of the Case

There are no issues of fact. By the amended pre-hearing stipulation below, the parties agreed to be bound by the "facts existing in the administrative record as found by the Board itself" (R. 229, 230, 232, 234).

Applying the criteria laid down by this Court in *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 304 (1937), the Board found that petitioners' proposed dual-rate system was necessary to restore and maintain rate stability in the Japan-Atlantic and Gulf trade and to prevent destructive rate wars; that the proposed spread between contract and non-contract rates was reasonable; that a non-conference competitor would not be excluded from the trade, but would carry at least its aliquot part of the traffic; and that, with certain modifications required by the Board, the proposed form of exclusive patronage contract with shippers, including the provision for liquidated damages, was reasonable. On the basis of these findings the Board concluded that the proposed dual-rate system should be approved under § 15 of the Shipping Act (R. 61-9).

The Conference Member Lines serve the trade from Japan, Korea and Okinawa to United States Atlantic and Gulf of Mexico ports. Prior to World War II, they had employed a dual-rate system and thereby brought about stability of rates (R. 23, 24-5). The system was not reinstituted immediately following the post-war resumption of commercial trading with Japan in late 1948. Respondent Isbrandtsen Company, Inc., commenced a service in the Japan/U. S. North

Atlantic trade and, since 1949, has operated approximately fortnightly sailings (R. 24, 25, 28). Although entitled to Conference membership and, in fact, invited to join, Isbrandtsen, in accordance with its established policy, has elected to operate outside the Conference and in rate competition with it (R. 25).

Isbrandtsen did not develop an independent rate structure, but rather pursued the policy of undercuoting Conference rates generally by 10 percent. Isbrandtsen's representatives appealed to shippers by publicly proclaiming its cut-rate tariffs. This appeal has been furthered by such methods as the circulation of comparative tariffs showing Conference rates in one column and Isbrandtsen's cut rates for the same commodities in an adjacent column (R. 29).

Isbrandtsen during the next three years, 1950, 1951 and 1952, with only 11% of the sailings, succeeded in securing 30% of the cargo. During the same period on each sailing Isbrandtsen's vessels carried on the average three times as much as the Conference lines' vessels, although the Conference vessels afforded special facilities which Isbrandtsen's vessels were not equipped to furnish (R. 25; 26-7, Table I). Considering the high proportion of fixed operating costs per vessel, this impact upon the Conference Lines threatened the very objectives of their agreement, viz., the maintenance of stability and uniformity of rates for shippers together with a compensatory return for the carriers.

The Conference determined that it could not regain its lost traffic by conforming its rates to those Isbrandtsen was then charging inasmuch as Isbrandtsen, in pursuing its rate-cutting policy, would auto-

matically counter these Conference reductions by further cuts until rates would reach a non-compensatory level. Indeed, the Conference would be at a disadvantage in any rate-cutting competition with Isbrandtsen since, as distinguished from Isbrandtsen, a deliberative process is a condition precedent to any rate action that the Conference might undertake (R. 30).

The Conference could have opened rates, *i. e.*, released them from Conference control, so that the members would be in rate competition not only with Isbrandtsen but with each other. Historically, the result of this course is a rate war and an unstable rate structure, hardly a desirable solution from either the public or the private point of view.

In the circumstances, the Conference was relegated to the adoption of a dual-rate system, a defensive measure which it had employed pre-World War II and which numerous other conferences, under analogous circumstances, had maintained for years, all in reliance on the rulings of the Board made pursuant to its interpretation that the Shipping Act authorized the employment of a dual-rate system in the appropriate situation—an interpretation which appeared to be corroborated by the opinions of this Court in 1932 and subsequent years. The proposal of this Conference was filed in a Statement under the Board's General Order 76,[3] which would permit such proposals to become effective after 30 days unless on the basis of objections or of its own motion the Board should postpone its effectiveness. Isbrandtsen and the Department of Justice protested and requested postponement of the system pending the outcome of a

[3] 46 C. F. R. §236.3.

hearing on their protests. The Board granted the request for a hearing but denied the postponement.

The court below, by interlocutory injunction in an earlier review, stayed so much of the Board's order as denied the postponement and enjoined the Conference from instituting the system.[4]

The Conference, restrained from using its only defensive device which would maintain rate stability and unable further to endure the loss of traffic, in the Spring of 1953 opened rates on the major traffic items. The result was a rate war in which rates, utterly lacking stability, plunged about 60 to 70 percent, and in some instances even below loading and discharging costs (R. 30-1).

The historical effect of a rate war upon United States commerce, as found by the Alexander Committee in 1914, was repeated in this case. The Board found (R. 32):

> "The resultant instability has affected the smooth flow of commerce between Japan and the United States; has raised a threat that customs duties in the United States might be increased; has affected the value of inventories of Japanese goods in the United States; has caused requests for postponement of shipments by F. O. B.

[4] The court announced in chambers on February 3, 1953, that it was of opinion the interlocutory injunction should be granted. The order granting same was made and filed on March 23, 1953. The court's final order in that proceeding set aside so much of the Board's order as had been stayed and enjoined the Conference from instituting the dual-rate system until the Board should specifically approve thereof pursuant to § 15 of the Shipping Act. *Isbrandtsen Company, Inc.* v. *United States*, 211 F. 2d 51, cert. denied *sub nom. Japan-Atlantic & Gulf Freight Conference, et al.* v. *United States, et al.*, 347 U. S. 990 (1954).

> buyers in the United States, since such buyers assume the risk of fluctuating freight rates. Prices for the sale of Japanese goods are often fixed by the importers in the United States as much as six months in advance of their arrival in the United States."

The evils of instability continue to this day, albeit rates, under the impact of unexpectedly heavy cargo movements, have recovered from their early depths.

In the meantime the hearings before the Examiner and thereafter the Board were proceeding, culminating on December 12, 1955, in the Board's approval of the proposed system with specified modifications, based upon the findings above abstracted. Isbrandtsen thereupon, by its petition filed in the court below pursuant to 5 U. S. C. §§ 1031, *et seq.*, sought to have the Board's Report, and the Orders predicated thereon, vacated and set aside, and requested injunctions against their enforcement and the institution of the dual-rate system by the Conference (R. 2-18).

Under the Hobbs Act (5 U. S. C. §§ 1031, *et seq.*, § 1034), the United States was a necessary party. Under the lower court's Rule 38(a), the Board was likewise a necessary party. The United States and the Secretary of Agriculture, who had intervened at an earlier stage of the proceedings, appeared by the Attorney General and argued that the Board's Order and approval be set aside. The Board appeared by its general counsel and, together with the petitioners, who intervened, argued in support of its order.

The final judgment, of which review by this Court is now sought, set aside the Board's Order and ap-

proval and enjoined the Conference from acting under it. The decision rested squarely on the basic legal proposition that the dual-rate system is illegal *per se* under § 14, Third of the Shipping Act.

Reasons for Granting the Writ

1. The Question Involved Is of Paramount Public Importance.

(a) The decision below affects countless persons, shippers, carriers and consumers who are not parties to this litigation and who reside throughout the United States and in foreign lands.

The decision below demolishes a long established practice of numerous ocean carriers of many nationalities in widespread branches of our foreign commerce who are not parties to this litigation. It also affects countless merchants, not only throughout our nation but wherever, throughout the world, men trade with the United States and its people. These men cannot freely conduct their business if every sale for future delivery involves a hazardous speculation in freight rates. Representatives of thousands of Japanese exporters so testified in this case. No merchant appeared to express a contrary view.

There are upwards of sixty conferences serving various United States foreign trades which currently employ dual-rate systems not yet under formal attack. We understand, however, that Isbrandtsen has already demanded that the Board should direct these Conferences to cease and desist on the ground that dual-rate systems have been rendered illegal *per se* under the decision below.

To illustrate the decision's widespread geographical impact, we attach as Appendix C hereto a copy of an advertisement which, we are informed, Isbrandtsen placed in the November 15, 1956, issue of South China Morning Post, printed in Hong Kong, in which merchants are advised that the decision below rendered unlawful dual-rate systems in all American trade routes, including the Hong Kong/United States dual-rate system, and that hence the freight contracts between shippers and carriers in that trade were void.

(b) The decision below will affect other pending litigation.

There are pending in the court below two cases entitled *Ezra Taft Benson, Secretary of Agriculture of the United States* v. *United States and Federal Maritime Board et al.*, Nos. 13,316 and 13,373, attacking as illegal *per se* the dual-rate system of the North Atlantic Continental Freight Conference,[5] approved by the Board on February 29, 1956. Now before the Board are F. M. B. Dockets Nos. 726, 733, 734 and 735, attacking as illegal *per se* the dual-rate system of the Far East Conference,[6] which has been in effect since 1929; F. M. B. Docket No. 732, attacking as illegal *per se* the dual-rate system of the Gulf/Mediterranean Ports Conference;[7] and F. M. B. Docket No. 795, involving a proposal of the Great Lakes-Bordeaux/Hamburg Range Westbound Conference to institute a dual-rate system.

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[5] This Conference serves the trade from United States North Atlantic ports to ports in Belgium, Holland and Germany, exclusive of German Baltic ports.

[6] This Conference serves the trade from United States Atlantic and Gulf of Mexico ports to ports in Japan, Korea, Formosa, Siberia, Manchuria, China, and the Philippine Islands.

[7] This Conference covers the trade from United States Gulf of Mexico and South Atlantic ports to ports in the Mediterranean, Adriatic, Gulf of Taranto, and Black Sea areas.

(c) The conflicting positions of the participating governmental agencies confirm the significance of the issue at stake.

The importance of this question is underscored by the active, although we believe ill-founded, opposition of the Departments of Justice and Agriculture. Our farmers obviously have no special interest in the substantially non-existent agricultural imports from Japan; and, therefore, the Secretary's intervention here, as well as his active participation in other dual-rate cases,[8] must betoken a view that the correct determination of the question presented has overall importance to our agricultural population.

Thus, in addition to the private antagonists, Isbrandtsen on one side and the Conference on the other, we find the government itself divided on this question. On one side, the Departments of Justice and Agriculture are animated by the view that antitrust concepts must at all costs be applied to international shipping. On the other, the Board, with 40 years' experience in the regulation of shipping under legislation committing that function exclusively to it, contends that, in international shipping, antitrust concepts without modification to fit particular circumstances mean chaos; and that the Shipping Act objectives of promoting our foreign commerce and improving our merchant marine require rate stability and uniformity, and that these objectives can justify associational activity necessary to achieve them.

In view of this irreconcilable conflict among government representatives, the decision below has confronted the major portion of the maritime industry

[8] *E. g.*, the Transatlantic dual-rate case, footnote 5, *supra*.

and their legal advisers with uncertainty whether their understanding of the Shipping Act and of the decisions of this Court or the understanding stated by the court below is correct. Section 14 of the Shipping Act is penal; violation is a misdemeanor punishable by a fine of not more than $25,000. We urge that the ocean carriers be not left in doubt in so vital a matter and that a decision of this Court resolving this conflict is in the general interest.

2. The Decision Below Ignored and Overturned a Settled Administrative Interpretation and Practice Vital to the Accomplishment of the Objectives of the Shipping Act.

From the earliest time, the Board has taken the position that the dual-rate system is not illegal *per se*, but that its legality depends upon the competitive and economic conditions prevailing in the trade under inquiry. Its earliest decided case on the point was *Eden Mining Co.* v. *Bluefields Fruit & Steamship Co.*, 1 U. S. S. B. 41 (1922). Although the Board there disapproved the system under attack as practiced by a single carrier, it held (*Id.* at 48):

> "After full consideration of all the facts and evidence of record, the board concludes and decides that the exaction of higher rates from the complainants than from other shippers for like service *under the circumstances involved in this case* subjected the complainants to undue and unreasonable prejudice and disadvantage, and constituted unjust discrimination between shippers, *in violation of sections 16 and 17 of the shipping act.*" (Italics supplied.)

However, the Board rejected, on the adduced evidence, the charge of violation of § 14, Third (*Id.* at 46).

This treatment of the legality of dual-rate systems as depending upon the facts of each case has persisted to this day; albeit the Board, with the guidance of this Court (*Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 304 (1937)), has evolved the criteria to be applied. The Report of the Board herein so thoroughly and concisely reviews the many intervening administrative decisions, that for brevity we here content ourselves with a reference to the Board's analysis (R. 38-50).[9] In all of the later decisions cited in the report, the Board followed the criteria prescribed in *Swayne & Hoyt, Ltd., supra,* and sustained the validity of dual-rate systems where they operated to secure stability of rates without unduly restricting competition.

The court below, although it stated that it might agree with the validity of rate stability as an objective, nevertheless felt it had to deprive the maritime industry and the regulatory agency of the device of the dual-rate system, thought for these many years to be legal.

The Board's consistent administrative interpretation is entitled to be given great weight. In *United*

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[9] In *Isbrandtsen Co., Inc.* v. *United States*, 96 F. Supp. 883, 889-91 (S. D. N. Y. 1951), affirmed by an equally divided Court *sub nom., A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Co., Inc.*, 342 U. S. 950 (1952), the lower court, although deciding the case on its facts, took issue with the assertion of consistency of administrative interpretation. We submit that the Board's own analysis of its historic position is entitled to weight, and, moreover, that an independent review of the administrative decisions confirms the Board's analysis.

States v. *Midwest Oil Company*, 236 U. S. 459, 472-3. (1915), this Court said:

> "2. It may be argued that while these facts and rulings prove a usage they do not establish its validity. But government is a practical affair intended for practical men. Both officers, lawmakers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation."

Instead of giving weight to the established administrative interpretation and practice, the decision below appears to require the termination of all existing dual-rate systems and the consequent disintegration of regulated conference control of rates in all of those foreign trades which have been confronted with cut-rate competition. It frustrates a principal function of the Board under the Shipping Act and thwarts one of the very purposes that the Congress sought to achieve by the enactment of that legislation.

3. The Decision Below Is Inconsistent With Decisions of This Court.

The petitioners urge that the decision below is in direct conflict with the holdings of this Court in *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S.

474 (1932), *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297 (1937), and *Far East Conference* v. *United States*, 342 U. S. 570 (1952). Even if the cited cases should not be considered to have held directly that the dual-rate system is not illegal *per se*, the court below, in the language of paragraph 1(b) of Rule 19, which sets forth those reasons which lead to a grant of certiorari by this Court, "has decided an important question of federal law which has not been, but should be, settled by this court".[10] We submit, however, that a direct conflict exists between the decision below and the above cited opinions of this Court.

In *U. S. Navigation Co.*, this Court affirmed the dismissal of a complaint by a non-conference competitor seeking an injunction against a conference dual-rate system with coercive differentials on the ground that the system violated the antitrust laws. It was held that the Shipping Act *pro tanto* superseded the antitrust laws, and that resort must be had in the first instance to the Board for a determination whether the complaint charged violation of the Act. In considering complainant's contention that the dual-rate system is unlawful *per se*, and that an agreement to maintain one cannot be approved, the Court said (284 U. S. at 485, 487):

> "The * * * [Shipping Act] is restrictive in its operation upon some of the activities of common carriers by water, and permissive in respect of

[10] The court below states, "We are aware that the dual-rate system has not been held by any judicial decision to be invalid under section 14 Third; that is, without regard to the reasonableness or justness of the discrimination inherent in the system. * * * [The] fact is that the cases [those cited above] do not decide the point." (R. 244-5; App. B, pp. B-10—B-11).

> others. Their business involves questions of an exceptional character, the solution of which may call for the exercise of a high degree of expert and technical knowledge. *Whether a given agreement among such carriers should be held to contravene the act may depend upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions in respect of the shipping of foreign countries, and of other relevant circumstances,* generally unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade; and with which that body, consequently, is better able to deal.
>
> * * * * *
>
> "Moreover, having regard to the peculiar nature of ocean traffic, *it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications.*" (Italics supplied.)

There appears to be a direct conflict between the decision below and *U. S. Navigation.* Basic principles of equity procedure would require that the complaint in *U. S. Navigation* should not be dismissed merely because it stated no claim for relief under the Sherman Act if, indeed, the conduct charged therein constituted a *per se* violation of § 14, Third, or any other section of the Shipping Act.

Further, if this Court had entertained the view that a dual-rate system is illegal *per se*, only a ques-

tion of law would have been involved which would not call for the application of the primary administrative jurisdiction rule. *Great Northern Railway Co.* v. *Merchants Elevator Co.*, 259 U. S. 285 (1922).

The ruling in *U. S. Navigation Company* was reaffirmed in an antitrust suit brought by the United States in *Far East Conference* v. *United States*, 342 U. S. 570 (1952).[11]

In *Swayne & Hoyt, Ltd.*, 300 U. S. 297 (1937), the Board had suspended certain tariff schedules instituting a dual-rate system in *intercoastal* commerce after finding that the Intercoastal Shipping Act, 1933 (46 U. S. C. § 843, *et seq.*), provided means whereby the Board could directly effect rate stabilization without the necessity of a dual-rate system and that, therefore, the system could only have the effect of restricting competition. The three-judge statutory court had refused to set aside the Board's order on the ground that the dual-rate system, in and of itself, was a violation of § 16 of the Shipping Act (18 F. Supp. at 27-8). On appeal this Court affirmed the court below, but declined to follow its view that a discriminatory tariff was, in and of itself, a violation of § 16 of the Shipping Act. Instead, it held that the issue whether such discrimination was undue or unreasonable within the meaning of § 16 was for the Board to decide and that in the case presented there was substantial evidence to justify the Board's conclusion that the attempted rate discrimination was unreasonable, since its purpose was not to effect rate stabilization. In the course of its opinion, this Court laid down the criteria which should govern the Board

[11] The dissent in *Far East Conference* rested in part on illegality *per se* under § 14, Third.

in determining whether the *prima facie* discrimination involved in a dual-rate system is undue or unreasonable (300 U. S. at 304):

> "*In determining whether the present discrimination was undue or unreasonable* * * * [the Board] was called upon to ascertain whether its effect was to exclude other carriers from the traffic, and if so, whether, as appellants urge, it operated to secure stability of rates with consequent stability of service, and, so far as either effect was found to ensue, to weigh the disadvantages of the former against the advantages of the latter." (Italics supplied.)

This Court further had occasion to deal with the relationship of § 16 to § 14, Third and, in an oft-cited footnote (300 U. S. at 307), concluded that the dual-rate system did not *per se* violate that section, saying:

> "* * *
>
> "The report of the House Committee on Merchant Marine & Fisheries [the Alexander Committee], H. R. Doc. 805, 63rd Cong., 2d Sess. (1914), recommended (p. 307) the prohibition of deferred rebates, adopted in § 14 of the Shipping Act, because it operated to tie shippers to a group of lines for successive periods, and because the system 'is unnecessary to secure excellence and regularity of service, a considerable number of conferences being operated today without this feature.' See, e. g., pp. 103-105, 200. The Committee recognized that the exclusive contract system does not necessarily tie up the shipper as completely as 'deferred rebates,' since it does not place him in 'continual depend-

> ence on the carrier by forcing his exclusive patronage for one contract period under threats of forfeit of differentials accumulated during a previous contract period. Accordingly the Committee did not condemn the contract system completely. Cf. W. T. Rawleigh Co. v. Stoomvaart, 1 U. S. S. B. 285. The policy of the statute may properly be applied where, as in the circumstances of this case, the contract system must be taken as actually operating to effect a monopoly. Cf. Eden Mining Co. v. Bluefields Fruit & S. S. Co., 1 U. S. S. B. 41."

We urge that this footnote is holding, not dictum, since the Court could not have concluded that the Board had a discretion under § 16 with regard to dual-rate systems if the dual-rate system were illegal *per se* under § 14, Third.

The holding below leaves no scope whatever to the doctrine that a *prima facie* discrimination may be found to be justifiable, and renders the carefully articulated yardstick of *Swayne & Hoyt, Ltd.*, completely useless.

4. The Language of the Statute and the Legislative History Are Persuasive That the Dual-Rate System Is Not Illegal *Per Se*.

Whether the question here is considered to involve a conflict with decisions of this Court or to be a matter of first impression, the decision of the court below conflicts with the general purposes of the Act as well as with specific portions thereof.

In international transportation, authority to control rates lies in the respective governments where the termini are located. Exercise of this authority by any of these sovereigns contains the germ of intergovernmental conflict. Accordingly, to secure the benefits to our foreign commerce and our merchant marine flowing from stability of rates, Congress adopted the instrumentality of voluntary cooperation among the carriers under the watchful eyes of the Board. At the same time, it prohibited certain actions, specifically defined, in § 14 of the Act.

Section 14, subdivision First, outlaws deferred rebates, *i. e.*, rebates in consideration of a period of exclusive patronage, payable some time after the end of that period only if, during the period of deferment also, exclusive patronage has been continued. Significantly, subdivision First so narrowly defines the prohibited practice as not to preclude rebates in consideration for exclusive patronage or a promise thereof, available under published tariffs to all shippers alike, and payable promptly on the completion of the service. Subdivision Second outlaws the fighting ship, *i. e.*, a vessel used to exclude competition by driving another carrier out of the trade.

Subdivision Third, the basis of the decision below, provides that no common carrier by water shall, directly or indirectly,

> "Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or

has filed a complaint charging unfair treatment, or for any other reason."

It cannot be contended that a dual-rate system involves refusal or threat to refuse space accommodations. Hence the first clause of subdivision Third is inapplicable. We submit that the court below incorrectly read the remainder of subdivision Third to prohibit the dual-rate system as retaliatory and as a discriminating method.

Retaliation according to the court below consists in the act of differentiating in rates between those shippers who do and those who do not agree to give Conference vessels their cargoes and, secondly, in providing a method of liquidated damages to compensate the carriers upon breach of the shipper's agreement.

This is an extraordinary definition of the concept of "retaliation." It accords neither with the dictionary definition of the term nor with its accepted usage. Surely, to provide for liquidated damages for breach of a contract is not retaliation, but a formula for compensation for breach of contract where legal standards of proof are difficult to meet. Such a formula is unenforcible if the liquidated damages are in the nature of a penalty and not a *bona fide* attempt to measure the consequences of the breach; and being unenforcible could not be retaliatory.

Nor is the offering of a reduced rate to shippers who are willing to cooperate with carriers in achieving a stable rate structure by entering into exclusive agreements with these carriers retaliatory in any sense of that word. Retaliation, as subdivision Third clearly points out, consists of such acts as the refusal

to grant a non-contracting shipper space accommodations or other services that otherwise would have been accorded to him. The Conference does not say to shippers: "Because you have been unwilling to ship exclusively with us, we will not afford you services that otherwise would be available to you." The Conference does say: "If you will agree to give us all your cargoes, we will give you a discount in our rates." This is not retaliation; it is the granting of a preference for a consideration which may or may not be warranted.

Further, we contend that the forbidden "other discriminating or unfair methods" cannot be read so broadly as to comprehend contracts and rates. To do so is to attribute to "other" too vague and ambulatory a meaning for a highly penal provision such as § 14. Here is a most fitting situation for the application of the *ejusdem generis* rule. The forbidden discriminating or unfair methods should be limited to practices involving something akin to refusal of space accommodations, viz., some withholding of physical facilities or services of the common carrier. No such withholding inheres in the dual-rate system.

Indeed, to read the second clause of subdivision Third as absolutely prohibiting *rate* discrimination "*for any other reason*" would render surplusage the prohibitions against *undue, unjust,* or *unreasonable* discrimination contained in §§ 15, 16 and 17 (46 U. S. C. §§ 814, 815, 816), which deal specifically with agreements, preferences and rates, and would cut away the administrative discretion recognized in *Swayne & Hoyt, Ltd.* Surely the determination by the Board, based on substantial evidence, that a particular prac-

tice is not a discriminating or unfair method should be respected by the courts.

That this is the interpretation that should be placed on § 14, Third, is clearly demonstrable by reference to legislative history. The adoption of the Shipping Act was preceded by an exhaustive investigation by the so-called Alexander Committee. The report of that Committee[12] has been recognized for years as basic source material for the interpretation of that Act.

That report specifically analyzes the various methods which it found conferences were employing to meet the competition of outside lines. Among these methods were the dual-rate system, the deferred rebate, the fighting ship and the refusal to grant to shippers who used outside lines services extended to those who dealt exclusively with the conference.[13] The report recommended the prohibition of the three last types of conduct and § 14 carries out this recommendation.[14] But it did not recommend the prohibition of the dual-rate system. It left that question to be dealt with by the Board. In short, if the preferential features of such a system were not justified in the opinion

[12] H. R. Doc. 805, 63d Cong., 2d Sess. (1914).

[13] H. R. Doc. 805, 63d Cong., 2d Sess. 287-90 (1914).

[14] The language of § 14 should be compared with the Committee's recommendation of practices that should be banned (*Id.*, p. 421):

> "(6) That the use of 'fighting ships' and deferred rebates be prohibited in both the export and import trade of the United States. Moreover, all carriers should be prohibited from retaliating against any shipper by refusing space accommodations when such are available, or by resorting to other unfair methods of discrimination, because such shipper has patronized an independent line, or has filed a complaint charging unfair treatment, or for any other reason."

of the Board by the objectives sought to be attained and by the fairness and reasonableness of the particular methods employed to achieve these objectives, the Board was under the duty to turn down an agreement to put such a dual-rate system into operation.

The concurring opinion below seeks to deprive this argument of its premise by reference to certain contracts in the record of the Alexander Committee Investigation (R. 249, footnote 3; App. B, p. B-15). We submit that the attempted distinction is not justified by the language of the contracts referred to and of the testimony regarding their application. There are numerous other contracts in the Committee's records[15] which must be taken into account if an effort is to be made to impeach the Committee's own description of the dual-rate system as follows[16]:

> "(a) *Joint contracts made by the conference as a whole.*—Such contracts are made for the account of all the lines in the agreement, each carrying its proportion of the contract freight as tendered from time to time. The contracting lines agree to furnish steamers at regular intervals and *the shipper agrees to confine all shipments to conference steamers,* and to announce the quantity of cargo to be shipped in ample time to allow for the proper supply of tonnage. *The rates on such contracts are less than those specified in the regular tariff,* but the lines generally pursue a policy of giving the small shipper the

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[15] *Proceedings of the House Committee on the Merchant Marine and Fisheries,* 62d Cong., 2d Sess., Vol. I, pp. 225-7, 246-51, 262-3, 265, 274, 385, 386-8, 390-1; Vol. II, pp. 1404-6.

[16] H. R. Doc. 805, 63d Cong., 2d Sess. 290 (1914).

same contract rates as the large shippers, i.e. are willing at all times to contract with all shippers on the same terms.'" (Italics supplied.)

Further to discredit the contention that the Shipping Act contains no prohibition of the dual-rate system, a practice well known to the Alexander Committee, the concurring opinion would distinguish the exclusive patronage contracts here in issue as being "almost illusory" (R. 249; App. B, p. B-15). While we do not concede the correctness of this characterization of the contracts involved, what is significant is the resort by the concurring Judge to this unrealistic analysis and the concurrence in that analysis by all the Circuit Judges. It obviously has no relationship to the economic impact of the contracts involved in the dual-rate system. To be contrasted is the analysis made by the Board, which took into account the broad economic consequences to carriers and merchants alike, in our foreign commerce, of the employment of these contracts in conjunction with dual-rates, and the Board's comparison of these consequences with the conditions prevailing in the absence of such a system. It was just such economic considerations that motivated the Congress in adopting the Shipping Act. While the Court of Appeals did not quarrel with the Board's interpretation and application of the policy of the Act, it did, on judicial review, nullify the exclusive primary jurisdiction of the Board on a rationale utterly foreign to the standards of judgment proposed by this Court in *U. S. Navigation Co.* (284 U.S. at 485, 487, quoted *supra*).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

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January 30, 1957.

APPENDIX A

Selected Provisions of the Shipping Act, 1916, as Amended.

SEC. 14. (46 U. S. C. § 812) That no common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

First. Pay, or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow, a deferred rebate to any shipper. The term "deferred rebate" in this Act means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term "fighting ship" in this Act means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade.

Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when

such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $25,000 for each offense.

SEC. 15 (46 U. S. C. § 814) That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings

between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provision of the Act, approved July second, eighteen

hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", and amendments and acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", and amendments and acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

SEC. 16. (46 U. S. C. § 815) That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect what-

soever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this Act.

Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense.

SEC. 17 (46 U. S. C. § 816). That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or

collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

Every such carrier and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13027

ISBRANDTSEN COMPANY, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA and FEDERAL MARITIME BOARD,

Respondents,

THE SECRETARY OF AGRICULTURE,

Intervenor,

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE, et al.,

Intervenors.

ON PETITION FOR REVIEW OF ORDERS OF THE FEDERAL MARITIME BOARD

Decided November 9, 1956

* * * *

Before PRETTYMAN, FAHY and WASHINGTON, *Circuit Judges.*

FAHY, *Circuit Judge:* Pursuant to 64 Stat. 1130 (1950), 5 U. S. C. § 1034 (1952), Isbrandtsen Company, Inc., petitions as a party aggrieved for review of orders of the Federal Maritime Board which are

described as a Report served December 14, 1955, and orders served December 21, 1955, and January 11, 1956. The respondents are the Board and the United States, the latter being a statutory respondent under section 1034, *supra*. The United States, however, represented by the Attorney General, has joined Isbrandtsen in attacking the validity of the orders under review. The intervenors are the Secretary of Agriculture, supporting Isbrandtsen, and the Japan-Atlantic and Gulf Freight Conference, defending the orders of the Board.

The Conference is a voluntary association of 17 steamship lines operating between Japan, Korea, and Okinawa, and the Gulf and Atlantic Coasts of North America. Five of the members are American, eight are Japanese, and four are of other nations. The primary purpose of the Conference is to establish and maintain agreed rates among the members. The basic agreement under which the Conference operates was approved by a predecessor agency of the Federal Maritime Board in 1934 under section 15 of the Shipping Act of 1916, 39 Stat. 733, as amended, 46 U. S. C. § 814 (1952).[1]

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[1] Section 15 provides in pertinent part:

"Every common carrier by water * * * shall file immediately with the Federal Maritime Board a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the volume of freight or passenger traffic to be carried; or in any manner providing for an exclusive, prefer-

Isbrandtsen is not a member of the Conference, although membership is open to any common carrier regularly operating or intending regularly to operate in the trade. Since shortly after World War II Isbrandtsen has been the sole non-Conference line which has maintained a berth service in the Japan-Atlantic trade. This trade is overtonnaged and consequently the vessels of both Isbrandtsen and the Conference have had a substantial amount of free and usable space after completion of loading in Japan. Between 1947 and March 12, 1953, Isbrandtsen maintained its rates on most commodities an average of 10 per cent below the rates established by Conference members under their agreement. Isbrandtsen's share of the business during this period was substantial,

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ential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.

"The Board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.

"• • •

"All agreements, modifications, or cancellations made after the organization of the commission shall be lawful only when and as long as approved by the Board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

"Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto."

and its average carryings per sailing were much higher than were the average carryings of the Conference lines. In order to meet this competition the Conference members voted to adopt the exclusive patronage contract non-contract/dual-rate system described below, but when the Conference was restrained by this court from putting this system into effect prior to its approval by the Board the Conference, on March 12, 1953, opened the rates on ten major commodities. This permitted the member lines to set their own rates and to compete effectively with Isbrandtsen.

After March 12, 1953, rates dropped sharply, even to noncompensatory levels with respect to some commodities. In May, 1953, Isbrandtsen established minimum rates below which it would not go. This adversely affected its competitive position, so that since that date Isbrandtsen has carried little cargo in the trade.

On December 24, 1952, before rates had been opened by the Conference, it had filed with the Board, pursuant to the latter's General Order 76,[2] a statement advising the Board of the Conference's intention to institute in 30 days an exclusive patronage contract/non-contract dual-rate system in the Japan-Atlantic

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[2] Section 236.3 of that Order, 17 F. R. 10175, 46 C. F. R. 236.3, provides that steamship freight conferences proposing to establish contract/non-contract rates should file with the Board a statement containing:

"(a) The amount of the spread or differential . . .

"(b) The effective date;

"(c) The reasons for the use of contract/non-contract rates in the particular trade involved, and the basis for the spread or differential between such rates; and

"(d) Copies of the form of all contracts pertaining thereto."

trade, hereinafter referred to as the dual-rate system. Under the proposed system shippers who declined to sign an exclusive patronage contract with the Conference would be charged rates 9½ per cent higher for the same transportation service than the rates charged shippers who enter into such contracts. Breach of the exclusive patronage contracts would be sanctioned by means of a liquidated damage clause under which a shipper who breaches the contract by shipping with a non-Conference line would be obligated to pay to the Conference 50 per cent of the contract rate on the shipment. The contract would be entered into for an indefinite period, subject to cancellation by either party on three months notice.

Protests against the proposed dual-rate system were filed by Isbrandtsen and the Department of Justice, who requested the Board to prohibit the Conference from implementing the system until after a hearing had been held. The Board granted the request for a hearing, but declined to suspend operation of the dual-rate system, stating that the system appeared to be in compliance with the Shipping Act.

On petition for review in this court, we held that section 15 of the Act, note 1, *supra,* required the Board to approve the dual-rate system before it could legally be initiated. *Isbrandtsen Co.* v. *United States,* 93 U. S. App. D. C. 293, 211 F. 2d 51, *cert. denied,* 347 U. S. 990. Consequently we set aside the action of the Board allowing the system to go into effect without such approval, and enjoined the Conference from acting under the system until it was approved by the Board. Thereafter the Board's hearings resulted in its approval of the dual-rate system in the orders which are now here for review.

If the arrangements in question are such as the statute authorizes the carriers to make or the Board to approve, they are exempt from the inhibitions of the antitrust laws under section 15, note 1 *supra*. In providing for such exemption, however, the statute also places definite limits. For example sections 16 and 17 of the Act provide, "it shall be unlawful" for any common carrier by water, alone or in conjunction with another, to

> "make or give any undue preference or advantage to any particular person,"

or to

> "demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers * * *."

The Board strongly urges that the dual-rate system cannot be said to give any "undue preference or advantage" or to constitute a demand, charge, rate or fare which is "unjustly" discriminatory. It says that because of competitive conditions in the trade the preference is not "undue" or the discrimination "unjust". In explaining these conditions the Board points to the differences in the operating costs of carriers of different nationalities, to the need for stability of rates and services, to freedom of any steamship company to enter this trade in contrast to the requirements of the Interstate Commerce Act that there be a finding of public convenience and necessity, to the relationship between costs of operating and the quantity of cargo carried, and to other factors, all of which, in the view of the Board, are shown by the

record and support the Board's findings that the inauguration of the dual-rate system is a necessary competitive measure to offset the harmful effect of non-Conference competition in an overtonnaged trade subject to the injurious practice of undercutting of Conference rates. The Board points furthermore to its finding that the dual-rate system will decrease the possibility of continued rate wars with their disastrous consequences to American-flag lines, consequences repugnant to the purposes of the Act to encourage the development and creation of a naval auxiliary and reserve, and a merchant marine able to meet the requirements of the commerce of the United States with foreign countries.

We might agree with the Board that the objectives it seeks in approving the dual-rate system are consistent with the objectives of the statute; but these can be furthered only by means permitted by the statute. It is here that we find an insuperable barrier. Section 14, Third, of the Act provides that no common carrier by water shall

> "Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier * * * or for any other reason."

As we have seen, shippers who decline to sign an exclusive patronage contract with the Conference would be charged for the same transportation service rates 9½ per cent higher than those charged shippers who enter into such contracts, and breach of contract

by one who does sign would entail liquidated damages of 50 per cent of the contract rate. While in terms the 9½ per cent higher rate is for failure to enter into an exclusive patronage contract rather than for actually shipping via a non-Conference carrier, in reality the higher rate is for the latter, as are the liquidated damages. Each of these aspects of the dual-rate system is hinged to a shipper giving patronage to another carrier. This is explicit in the provision for liquidated damages, which is part and parcel of the dual-rate system and gives color to the whole; and it is implicit in the difference between the contract rate and the higher non-contract rate. When the latter is charged a shipper who has not entered into an exclusive patronage contract the substance of the matter is that a higher rate is charged because he ships by other than Conference carriers. The industry is concerned with the business of shipping, to which the making of contracts is but an incident. Both provisions, therefore, come within a fair meaning of retaliation. Furthermore, even though the shipper has not patronized another the higher rate constitutes retaliation because it is charged for failure to contract with the Conference. Section 14, Third, applies not only to retaliation for shipping by another carrier but for "any other reason," which would include failure to enter into the exclusive contract arrangement. True it is, as the Board urges with much persuasion, the dual-rate system may be very potent in promoting stability and regularity of service and may be warranted by competitive considerations; but when at the same time the system constitutes retaliation and is also discriminatory it runs into the barrier

of section 14, Third, however desirable it otherwise might be. That provision prohibits not only retaliation by a refusal or threat of refusal, of available space accommodations but also by "resort to other discriminating" methods. In the circumstances stated, the charge of a higher rate for the same service and facilities, of the imposition of the liquidated damages, is *prima facie* discriminatory, *Swayne and Hoyt, Ltd.* v. *United States,* 300 U. S. 297, and for the reasons we have outlined we think that it is also a method of retaliation. This is the thrust of these provisions under a fair reading of the language adopted by Congress. And since these provisions are unlawful the system containing them cannot validly be approved by the Board.

We cannot accept the argument that section 14, Third, must be read, in view of the terms of the Act as a whole, to condemn only retaliation which the Board might on a particular record find "unfair" or "unjustly discriminatory," terms used in other parts of section 14 and in sections 15 and 17. Where the conduct is retaliatory and constitutes discrimination, it is unlawful without more, unless its impact is unsubstantial, a subject we need not consider. Absent retaliation a preference or discriminatory rate is unlawful only if undue, unreasonable, unfair or unjust. Whether or not these characteristics exist depends upon the facts and circumstances of the case as found by the Board; and the courts will not substitute their judgment in this regard for that of the Board. *Swayne and Hoyt, Ltd.* v. *United States, supra.* There the court in effect approved an order of the Secretary of Commerce, the predecessor of the Board, which

had condemned a higher rate for a shipper who used a carrier other than a member of the Conference. The court said the differential was *prima facie* discriminatory since the two rates were charged for identical services and facilities, leaving for decision, in the first instance by the Secretary, the question whether the discrimination was "undue" or "unreasonable." The Secretary having concluded that it was, the court, considering the case under section 16, would not disturb his conclusion, which was in part based upon his finding that the operation of the contract system in the circumstances "does not differ substantially from that of 'deferred rebates' outlawed in both foreign and coastwise shipping by § 14 of the Shipping Act * * *." Since the dual-rate system here constitutes retaliation it must be condemned without regard to the question of its reasonableness, as are deferred rebates. For while it is not one of the methods specifically condemned by section 14, as are deferred rebates and fighting ships, nevertheless retaliation is specified in subparagraph Third of section 14 as a method which may not be resorted to when discriminatory.

We are aware that the dual-rate system has not been held by any judicial decision to be invalid under section 14, Third; that is, without regard to the reasonableness or justness of the discrimination inherent in the system. We have already referred to *Swayne and Hoyt, Ltd.* v. *United States, supra,* which, though it upheld the Board in condemning the dual-rate system there involved, did not rest upon section 14, Third. In *Far East Conference* v. *United States,* 343 U. S. 570, the court, adhering to principles previously laid down

in *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U. S. 474, required the District Court to dismiss a suit of the United States which attacked the dual-rate system as violative of the Sherman Act without the particular system having been passed upon initially by the Board. And in *A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Co.*, 342 U. S. 950, the court by an equally divided vote affirmed *Isbrandtsen* v. *United States*, 96 F. Supp. 883, which had invalidated the dual-rate system there involved, not under section 14, Third, but because the spread between the two rates was found to be arbitrary. From this situation in the courts the Board contends that the dual-rate system has not been considered invalid *per se*, otherwise the courts would have disposed of these cases on that ground. This position is an arguable one; but the fact is that the cases do not decide the point. And for the reasons which we have indicated we are of the opinion that additional legislation would be needed to permit the system, in the form here approved by the Board, to obtain the approval of the courts. Congress, after long consideration, lodged very substantial powers in the Board; but we find no language in the statute which, given its fair meaning, permits the Board to grant exemption from the antitrust laws, or to make lawful a discriminatory rate, or the imposition of liquidated damages, for patronizing a competitor, for refusal to enter into an exclusive patronage contract with Conference members, or for not shipping exclusively in accordance with such a contract.

We have considered the legislative history, particularly pertinent parts of H. R. Doc. No. 805, 63d Cong.,

2d Sess. (1914), known as the Alexander Report. The evils afflicting the industry due to uncontrolled competition on the one hand and unregulated carrier combinations on the other, are analyzed in this basic study preceding the Act. Reference is also made to H. R. Rep. No. 659, 64th Cong., 1st Sess. (1915);[3] H. R. 14337, 64th Cong., 1st Sess. (1915); S. Rep. No. 689, 64th Cong., 1st Sess. (1915).[4] We have found in this history no indication of an explicit intention by Congress to outlaw the dual-rate system, as is found with respect to deferred rebates and fighting ships. Furthermore, it is clear from its history, as from the Act itself, that not all discriminatory practices and preferences are unlawful. On the contrary, the Board is authorized to approve many methods, including the formation of the conferences themselves, which would be unlawful except for the Act and Board action thereunder. But it is significant that when Congress came to the matter of retaliation against a shipper it did not permit this particular type of conduct to be engaged in or to be approved by the Board if it involved any discriminating method.[5]

Finally, we have considered the Board's position

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[3] This Report at pp. 30-31 refers to retaliation by refusing space accommodations or "other unfair methods of discrimination."

[4] In this Report, at p. 5, section 15 of H. R. 15455 is described in part as forbidding "retaliation, etc., against a shipper because such shipper has patronized any other carrier."

[5] Compare H. R. 17328, 63d Cong., 2d Sess., section 2, Third, with H. R. 15455, 64th Cong., 1st Sess., showing changes which add "unjust" to "discrimination" in certain parts in the Bill, but not in section 2, Third, which corresponded with section 14, Third, of the Act, where discrimination without qualification is prohibited when used as retaliation.

that the enumeration of deferred rebates and fighting ships as practices absolutely prohibited, in contrast with the failure to include in such enumeration the dual-rate system, indicates that the latter was not to be considered illegal *per se*. We do not accept this position because to do so would seem to us to give little meaning to the important provision of section 14, Third, that retaliation for any reason is also absolutely prohibited if it constitutes discrimination. We think it clear not only that the liquidated damage provision is discriminatory but that a 9½ per cent differential for exactly the same service and facilities is of like character. Further discussion of the matter appears in Judge Washington's concurring opinion "in which, as in the present opinion, we all concur." *Walker* v. *Popenoe*, 80 U. S. App. D. C. 129, 131, 149 F. 2d 511, 513 (1945).

The orders of the Board will be set aside insofar as they approve the exclusive patronage contract/non-contract rate system.

WASHINGTON, *Circuit Judge*, concurring: I fully concur in Judge Fahy's opinion. However, certain additional observations may be made, with which both my colleagues agree, and which they have asked me to express on behalf of the court.

The crucial question on this appeal is of course whether Section 14, Third, of the Shipping Act of 1916[1] proscribes the type of contract here involved.

In the first place, it seems clear that in actual prac-

[1] 39 STAT. 733, as amended, 46 U. S. C. § 812, Third (1952).

tice the contract system is being used to penalize a shipper because he has patronized another carrier, or at least reserved the right to do so. Is this "retaliation," proscribed by the Act? Certainly there seems no reason to limit "retaliation" to the dictionary definitions of "returning like for like" or "evil for evil," which have been selected by the Board. The very example used by the statute, boycotting for use of another carrier, is not "like for like," nor are the boycotting carrier or group of carriers necessarily imbued with ideas of doing evil. But detriment to the independent shipper and the independent carrier plainly results.

Are these contracts, then, the sort of "discriminating or unfair methods" that the statute sought to anticipate? That the contract system comes within the literal meaning of this phrase is clear. As the Supreme Court observed in *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 303 (1937), a contract system under which different prices are charged for the same transportation of identical cargoes to identical ports under identical circumstances is "prima facie discriminatory."[2] Nevertheless, the Board

[2] It is urged that footnote 3 of the Court's opinion in *Swayne & Hoyt* is some authority for exempting the contracts in this case from Section 14, Third. There are two answers to this argument. First, the Court was there concerned not with a recommendation of the Alexander Committee but with an argument that had been addressed to the Committee. See H. R. Doc. No. 805, 63rd Cong., 2d Sess. 307 (1914). Second, and more significant, is the fact that the contracts considered in *Swayne & Hoyt* closely follow the outlines of the contracts reviewed by the Alexander Committee in 1913, which are materially different from the contracts in this case, see text *infra*. The contracts in *Swayne & Hoyt* contained a firm price agreement that could not be varied during the term of the contract. See Swayne & Hoyt v. United States, 18 F. Supp. 25, 26 (D. D. C. 1936).

urges that the literal meaning of the statute should not be followed.

The Board's basic contention is this: Since dual rate contracts were considered by Congress in its survey of shipping practices, the conspicuous absence of this device from the list of those specifically barred —deferred rebates, fighting ships, and boycotts— demonstrates an implied congressional endorsement of this device. Were the premise sound, the argument would have some merit. But the fact is that the contracts examined by the Alexander Committee in 1913 were materially different from the contracts before us now. The 1913 contracts were bona fide requirements contracts. The sellers (carriers) undertook a firm obligation to provide space; both parties undertook firm obligations as to the price. And since the price was fixed for the term of the contract (usually 6 months), the price figure in the contract represented a hedge on the part of both parties against fluctuations in rates.[3] In the contracts in suit the carriers' commitment as to space is almost illusory,[4] being a commitment to carry "so far as regular services are available." The price aspect of the contract is in terms subject to increases. Thus, the two principal considerations normally given to a buyer (the shipper) under a requirements contract—guarantee of supply

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[3] For the text of the contracts considered by the Alexander Committee, see *Proceedings of the House Committee on the Merchant Marine and Fisheries*, 62nd Cong., 2d Sess., Vol. 1, pp. 97, 120, 289 (1913). For the Committee's summary of these contracts, see H. R. Doc. 805, *supra* at 290-91. In most of these contracts the price term was fixed as against increases, but shippers were entitled to any decreases in the regular tariffs. In other contracts the price stated was binding on both sides. See MARX, INTERNATIONAL SHIPPING CARTELS 202 (1953).

[4] See 1 CORBIN, CONTRACTS § 16 (1950).

and guarantee of no rate increase—are here lacking.[5] In their stead are two essentially penal provisions—the higher rate and the liquidated damage clause—both imposed to coerce shippers to refrain from using non-Conference carriers.[6] These differences are dispositive of the Board's principal argument. Implied congressional approval of a bona fide requirements contract is no basis for exempting the contracts in this case from the plain meaning of "discriminating or unfair methods." They must therefore be condemned.

---

[5] See, generally, Stockhausen, *The Commercial and Anti-Trust Aspects of Term Requirements Contracts*, 24 N. Y. U. L. Q. 412, 413 (1948).

[6] This is not to suggest that the liquidated damage clause would necessarily be unenforceable as a penalty, *cf.* Pacific Westbound Conference v. Leval & Co. (unreported) (Cir. Ct. Ore. 1951), cited in *Marx, supra* at 209, though it might be. See 5 CORBIN, CONTRACTS § 1054 (1951). It may be noted that compliance with the contracts used in 1913 was in many instances secured not by deferred rebates, see *Proceedings, supra* at 99, 204, 278, or by penalty clauses, *id.* at 96, but by threat of future boycotting, *ibid.*, a device specifically condemned in Section 14, Third. The contracts in this case would substitute for this blunt weapon the more refined techniques of penalty rates and liquidated damage clauses. Thus, instead of a retaliatory device to enforce a bona fide requirements contract, there are now retaliatory contracts, enforced by methods of seemingly equal effectiveness.

APPENDIX C

ISBRANDTSEN

Round the World Service

We have received the following cable from Isbrandtsen Co., Inc.:—

> UNITED STATES CIRCUIT COURT OF APPEALS WASHINGTON REVERSED FEDERAL MARITIME BOARD ORDER PERMITTING THE JAPAN UNITED STATES ATLANTIC GULF CONFERENCE ESTABLISHMENT OF THE EXCLUSIVE PATRONAGE CONFERENCE CONTRACT SYSTEM AND RULED THE CONFERENCE CONTRACT RATE SYSTEM UNLAWFUL AND CANNOT BE APPROVED BY FEDERAL MARITIME BOARD STOP NATURALLY THIS COURT DECISION MUST APPLY ALL AMERICAN TRADE ROUTES INCLUDING HONGKONG UNITED STATES BOUND CARGO

Any shipper desiring further information about this action of the United States Circuit Court of Appeals should contact us for details. It appears from this action of the United States Circuit Court of Appeals that any Exclusive Patronage Contract which shippers in Hongkong may have signed with the Conference covering the trade routes terminating in the United States will be included within this decision and also be unlawful in so far as cargo bound for the United States is concerned.

General Agents
HOTHERSHIP
Hother Trading & Steamship Co., Ltd.

(Reproduced from South China Morning Post, November 15, 1956).

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SUPREME COURT, U. S.

No. 74

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE, MITSUI STEAMSHIP CO., LTD., *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, ISBRANDTSEN COMPANY, INC., and EZRA TAFT BENSON, Secretary of Agriculture,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

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Johnson v. *Fredrick*, 9 F. R. D. 616 (D. Neb. 1949) 53

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Pacific Coast European Conference Agreement, 3 U. S. M. C. 11 (1948) 26, 66, 71

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United States v. *Hamburgh-American S. S. Line*, 216 Fed. 971 (S. D. N. Y. 1914), rev'd as moot, 239 U. S. 466, 36 S. Ct. 212, 60 L. Ed. 387 (1916) 77n

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United States Navigation Co. v. *Cunard S. S. Co.*, 284 U. S. 474, 52 S. Ct. 247, 76 L. Ed. 408 (1932), 24, 25, 43, 50, 51, 52, 53, 54, 55, 56, 57, 60, 66, 67, 73

United States v. *Prince Line*, 220 Fed. 230 (S. D. N. Y. 1915), rev'd as moot, 242 U. S. 537, 37 S. Ct. 233, 61 L. Ed. 479 (1917) 77n

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United States v. *Wiltberger*, 5 Wheat. (18 U. S.) 76, 5 L. Ed. 37 (1820) 34

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Revision of Title 28, Judiciary and Judicial Procedure, June 25, 1948, c. 646, 62 Stat. 928, 28 U. S. C. § 1254 (1) 1

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British Shipping in the Orient (38th Report of the Imperial Shipping Committee, 1939) 51 ..... 5n

Huebner, Grover, "Principles of Ocean Transportation" 81n

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Restatement, Contracts, § 339(1) 47

3 Williston, Contracts (Rev. Ed. 1936) 2191-2194 47

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Federal Maritime Board and Maritime Administration, Reports to Congress:

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H. R. 15455, 64th Cong., 1st Sess. (1916) 75n
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Proceedings of the Committee on the Merchant Marine and Fisheries, 62nd Cong., 2d Sess., Vol. 1 (1913):
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Reorganization Plan No. 21 of 1950, 15 F. R. 3178, 5 U. S. C. A. following § 133(z)-15 ..... 3n

Reports from Commissioners, Inspectors and Others, Cd. 4668 (1909), page 49 ..... 8n

Report of Senate Committee on Interstate and Foreign Commerce, "Merchant Marine Study and Investigation," 81st Cong., 2d Sess. (1950) 92

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 74

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE, MITSUI STEAMSHIP CO., LTD., *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, ISBRANDTSEN COMPANY, INC., and EZRA TAFT BENSON, Secretary of Agriculture,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR THE PETITIONERS

Opinions Below

The majority and concurring opinions of the Court of Appeals (R. 237-248) are reported at 99 U. S. App. D. C. 312, 239 F. 2d 933.

Jurisdiction

The jurisdiction of this Court is invoked under 64 Stat. 1132, 5 U. S. C. § 1040, and 62 Stat. 928, 28 U. S. C. § 1254 (1). The judgment below was en-

tered on November 9, 1956. The petition herein was filed on February 1, 1957, was granted on March 25, 1957 (353 U. S. 908) together with the petition of the Federal Maritime Board (No. 73, October Term, 1957), and the two cases were consolidated (R. 250).

Question Presented

The Federal Maritime Board, after extensive hearings and exhaustion of intermediate procedures, entered an order pursuant to § 15 of the Shipping Act, 1916, 39 Stat. 733, as amended, 46 U. S. C. § 814, approving an agreement among the members of the Japan-Atlantic and Gulf Freight Conference, common carriers by water in foreign commerce, to institute a dual-rate system under which they would establish one level of rates for shippers who sign contracts to ship exclusively by vessels of such of the Petitioners as they may select at the time of shipment, and another level of rates 9½% higher for shippers who do not sign such contracts. The Board found that, in the interests of shippers and carriers alike, the system agreed upon, as modified by the Board, was necessary to avoid destructive rate wars and restore and insure stability of rates and service to shippers in the trade; and that the approved system of rate differentials would not be monopolistic in its effect, nor prevent non-Conference competition from receiving at least a fair share of the traffic; and that the system would facilitate our foreign commerce. The Court of Appeals set this order aside on the ground that, even though it might agree that the objectives the Board sought in approving the dual-rate system in question are consistent with the objec-

tives of the Shipping Act, and despite the Board's findings, the dual-rate system is illegal *per se* under § 14, Third, of the Shipping Act, 1916, 39 Stat. 733, as amended, 46 U. S. C. § 812, Third.

The question presented is whether such a dual-rate system is illegal *per se* under § 14, Third, of the Shipping Act, 1916, 46 U. S. C. § 812, Third, with the result that the Board[1] is without power to approve, under § 15 of that Act, 46 U. S. C. § 814, an agreement among such common carriers to use such a system.

Statute Involved

The statutory provisions directly involved are §§ 14 and 15 of the Shipping Act, 1916, 39 Stat. 733, as amended, 46 U. S. C. §§ 812, 814. These provisions, together with other pertinent provisions of the Shipping Act, are printed in the Appendix hereto.

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[1] The United States Shipping Board was the agency which was established by § 3 of the Shipping Act, 39 Stat. 729, and which was charged with the administration of that Act. Subsequently, by Executive Order June 10, 1933, No. 6166, § 12 (set out in note under 5 U. S. C. A. § 132), the United States Shipping Board was abolished and its functions were transferred to the Department of Commerce. Thereafter, by the Merchant Marine Act, 1936, 49 Stat. 1985, the United States Maritime Commission was created and the functions of administering the Shipping Act were transferred to it. Finally, the functions of the United States Maritime Commission have been transferred to the Federal Maritime Board, pursuant to the provisions of the Reorganization Act of 1949, 63 Stat. 203-207, 5 U. S. C. §§ 133(z) to 133(z)-15, and Reorganization Plan No. 21 of 1950, 15 F. R. 3178, 5 U. S. C. A. following § 133(z)-15. The Federal Maritime Board and its predecessors are referred to in this brief as "the Board."

Statement of the Case

A. Introductory.

By prehearing stipulation in the Court of Appeals, as amended by an order of a judge of that court (R. 229-235), the factual basis for the resolution of the legal issues herein is to consist of "the facts existing in the Administrative Record as found by the Board." Accordingly, our statement of the case is derived from the Board's report (R. 19-69) except with respect to aspects of the procedural history of this litigation not encompassed therein.

B. The Conference.

The Petitioners are 17 common carriers of cargo by water from ports in Japan, Korea and Okinawa to ports on the Atlantic and Gulf of Mexico Coasts of the United States (Japan-Atlantic and Gulf Trade). Five of the Petitioners are American companies, 8 are Japanese and 4 are of other nationalities (R. 23). These 17 Petitioners (the Conference Members) are parties to an agreement (the Conference Agreement) approved by the Board under § 15 of the Shipping Act and designated Board Agreement #3103, as amended, establishing the Japan-Atlantic and Gulf Freight Conference (JAGFC) (R. 23-24). JAGFC is not a monolithic giant pitting its strength against the frail resources of Isbrantsen Co., Inc. (Isbrandtsen), which operates the only non-conference common carrier service in the Japan-Atlantic and Gulf Trade (R. 25). The only combined action contemplated by the Conference Agreement is that the

Conference Members shall charge uniform rates which they shall determine by a two-thirds vote (R. 137-152). Otherwise the Petitioners operate their vessels for their own account and profit; conduct their own businesses in such manner as their respective managerial judgments may determine; build such ships to be used in the trade as they may think most appropriate; have as many or as few sailings as they may deem best; and actively solicit cargo from all potential shippers. There is no pooling of earnings, and the Conference Agreement gives no member a financial interest in the operations of any other member.[2]

Free of any restriction on competition in quality of service, many of the Conference Members have introduced vessels of great speed and having special characteristics which adapt them to the Japanese-American trade, such as refrigerated space and strong

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[2] We have found no better definition of a conference than that which appears in *British Shipping in the Orient* (38th Report of the Imperial Shipping Committee, 1939) 51, quoted in Marx, *International Shipping Cartels* (1953) 250-251. The observations of Professor Marx and the quotation from the Imperial Committee are as follows:

> "One of the salient characteristics of shipping conferences, and one which has been influential in keeping profits from remaining excessive, has been the fact that conferences are not absolute monopolies. It is important to remember that shipping conferences are not combines linked by shareholdings or any other form of common ownership. It will be recalled that the Imperial Shipping Committee described them as follows: 'A shipping conference is a meeting in which competitors face one another with the object of achieving that minimum of cooperation which will suffice to prevent such chaotic competition as might render impracticable the liner system of working ships. Each member of a conference is seeking the minimum surrender of his competitive freedom which is compatible with this object; his attitude in debate is determined by the sources of strength which lie behind his diplomacy'."

rooms for the carriage of silk (R. 25). Isbrandtsen has supplied no such advanced types of tonnage (R. 35).

The Conference Agreement throws membership open to "any common carrier regularly operating or giving substantial and reliable evidence of intention to operate regularly in the trades covered by this agreement * * *" (R. 144), upon the payment of an admission fee of $1,000.00 (R. 145). This provision, coupled with the rule enforced by the Board, that conferences must admit to membership all common carriers able and willing to operate in the trade (*e. g., American-Hawaiian Steamship Co. v. Intercontinental Marine Lines*, 4 F. M. B. 160 (1953), and cases there cited), removes limitations upon the number of lines which may become members.

The loose nature of the Conference structure is thus apparent.

C. Economic History.

From 1928 to the outbreak of World War II, JAGFC and predecessor conferences had established and maintained a dual-rate system (R. 24-25). Upon the resumption of private steamship operation following World War II, JAGFC did not immediately reinstitute the dual-rate system.

Isbrandtsen operates a common carrier service in the Japan-Atlantic and Gulf trade, which it commenced not long after the close of World War II. Although invited to join JAGFC and entitled to membership, Isbrandtsen has declined to become a party to the Conference Agreement. It has, since

April, 1949, maintained its service at approximately fortnightly intervals via the Panama Canal (R. 25).

Isbrandtsen did not maintain tariffs which were *independent* of the JAGFC tariffs. Instead, Isbrandtsen's rates were, on the average, fixed at approximately 10% below the corresponding JAGFC rates. The general understanding of the shipping public was that Isbrandtsen would underquote JAGFC rates by 10%. This understanding was encouraged by the issuance by Isbrandtsen's Tokyo agents of "abbreviated freight tariffs" setting forth in parallel columns the Isbrandtsen and JAGFC rates on major commodities, from which it appears that on most items the Isbrandtsen rates were 10% below the JAGFC rates (R. 29). Whenever JAGFC rates were increased, Isbrandtsen's rates were correspondingly increased (R. 68).

The existence of a conference with a stable rate structure is both an invitation to, and a necessary condition of, such an operation as Isbrandtsen has been conducting. Competition among shippers and consignees inexorably impels them to fill the ships of the rate-cutting, non-conference operator, while the conference lines, which hold over it the "umbrella" of a stable rate structure, see their vessels depart with partial cargoes.[3] The operation of this principle in the Japan-Atlantic and Gulf trade is dramatic-

[3] A pithy statement of this principle appears in Marx, *International Shipping Cartels* (1953) 196:

"The fact remains that non-conference services continue to operate independently, despite their ability to join the conferences; and furthermore they do not generally charge conference rates. Why is this so? They must operate independently because it is to their advantage to do so. An independent line may have more flexibility in scheduling, but it will invariably have more flexibility in rate-making than

ally revealed in Table I of the Board's Report (R. 27). The statistics there tabulated show that during the three years 1950, 1951 and 1952 Isbrandtsen, with only 11% of the sailings in the Japan-Atlantic and Gulf trade, secured 30% of the *total* common carrier cargo transported in that trade, notwithstanding the special facilities afforded by many of the Conference vessels and lacking on Isbrandtsen's vessels.[4]

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the conference lines which make rates by committee. (Except for the possibility of greater schedule flexibility, there is no reason why an independent line can operate at lower costs than conference members). Furthermore, the independent, by charging lower rates, can frequently fill his ships when conference vessels are not able to sail fully loaded. By riding under the conference 'umbrella' the independent may, if it does not cut rates too vigorously, enjoy the benefits of stability and still carry more than its normal share of remunerative cargo."

We also refer to the *Reports from Commissioners, Inspectors and Others*, Cd. 4668 (1909), 49.

[4] In various briefs in this litigation Isbrandtsen has totalled the carryings of the Conference Members and of Isbrandtsen in both the Japan-Atlantic and Gulf trade and the Philippines/Atlantic and Gulf trade (Table II, R. 27), and pointed to the approximate parity of these totals as indicating that Isbrandtsen did not gain the tremendous advantage over the Conference Members which we have asserted above. There are two reasons why this combination of totals is inappropriate.

In the first place, as the Board pointed out (R. 26), the traffic in these two trades differs markedly. The Japanese traffic produces much higher revenues per ton than does the Philippine traffic, which consists principally of bulk cargoes, and accordingly, the Japanese cargoes are much more desirable from the revenue point of view. All carriers give priority to Japanese cargoes to the extent that they are obtainable. It therefore is no solution to the competitive problem that Isbrandtsen's vessels have sailed full of Japanese cargo, and the Conference Members' vessels have sailed full of Philippine cargo.

Secondly, the proposal here in question relates to the Japan-Atlantic and Gulf trade alone. The objective of the proposed dual-rate system is to maintain stability of rates and service in the Japan-Atlantic and Gulf trade by ensuring a fair share of the traffic in that trade to the Conference Members, notwithstanding Isbrandtsen's rate practice in that trade. The cargo movement in other trades is irrelevant.

Isbrandtsen's 30% cannot fairly be contrasted with the remaining 70% as if JAGFC were an integrated unitary competitor. The 70% which Isbrandtsen did not carry was divided among 15 individual and independent Conference Members so that they averaged less than 5% of the total cargo movement. Isbrandtsen's 30% amounted to six times this average. The impact of this disparity can be fully appreciated only when it is borne in mind that ocean shipping is an industry characterized by a high proportion of fixed operating costs, irrespective of the amount of cargo carried, a circumstance to which the Board refers implicitly in its Report (R. 62, 67).[5]

Thus, the Conference Members were suffering grievously charging full tariff rates, while Isbrandtsen, with only fortnightly sailings, was doing quite

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[5] The high proportion of fixed costs was established in a Congressional Investigation (H. R. Doc. 805, 63rd Cong., 2d Sess. 310, 420 (1914)).

In Marx, *International Shipping Cartels*, *supra*, at 19-21, it is estimated that once a vessel has been committed to a regular liner sailing, from 70% to 75% of the cost of its voyage becomes fixed. From this Marx concludes (*id.* at 21):

> "The crucial fact which appears from these estimates of costs is that, once a vessel has been scheduled by a liner operator or actually placed on berth by a tramp operator, a large proportion of the total expenses of the voyage has become fixed, and until the vessel is loaded 'full and down' it will be remunerative for that vessel to carry any additional cargo that can be procured so long as it pays anything in excess of the actual out-of-pocket expense involved. In trades where the flow of commerce is not balanced—and this is the case more often than not—both liners and tramps will be tempted to engage in cutthroat competition at least on the leg of the voyage on which cargo is light.
>
> "Increasing returns, especially important when fixed costs are high, depend on the existence of unused carrying capacity. Unused capacity is not only apt to occur periodically as a result of seasonal and cyclical fluctuations coupled with the imperfect mobility of vessels, but it has been a chronic condition which has plagued the industry in a large number of peacetime years. * * *"

well at rates which were 10% lower. The comparison of Isbrandtsen's *average* carryings per sailing with the *average* carryings of the Conference Members tells the story (Table I of the Board's Report, R. 27):

Year	Isbrandtsen's average carryings per sailing. (Revenue tons)	Conference Lines average carryings per sailing. (Revenue tons)
1949	3,016	1,317
1950	5,780	1,678
1951	4,450	1,261
1952	4,118	1,273
1953 (6 months)[6]	3,109	1,239

Late in 1952, Isbrandtsen publicized a plan to increase its service to three or four sailings per month (R. 61). Such an increase in service would inevitably have increased Isbrandtsen's participation in the traffic (R. 61).

Thus, Isbrandtsen's rate competition inevitably brought each Conference Member to a point where JAGFC must either adopt a competitive device to protect its members' carryings or, in large measure, abandon the Conference purpose of maintaining uniform and stable rates (R. 29). The third possibility, *i. e.*, the reduction of JAGFC rates to Isbrandtsen's level, was totally impracticable. Isbrandtsen's publicly proclaimed policy of cutting Conference rates rendered it certain that the initial effort to meet Isbrandtsen's rates would only be the first in a series of competitive rate cuts which would produce a level of rates ruinous to all concerned. Even if rates were

[6] On and after March 12, 1953, JAGFC opened rates on a wide range of items moving in heavy volume. The significance of this action will be explained below.

permitted to spiral downward, JAGFC could not hope to regain its lost traffic, since Conference rate action requires a deliberative voting process, whereas a single carrier, with no obligation of consultation, may reduce its rates instantaneously (R. 30).

Moreover, the reduction of Conference rates generally would have borne most heavily upon the American-flag Conference Members because of their high costs of operation. With respect to this subject, the Board found (R. 64):

> "We are unimpressed with this argument: even assuming that the conference's more cumbersome rate-making processes are adaptable to such a method of competition, success in eliminating Isbrandtsen through this type of rate warfare would be accomplished at the price of simultaneous elimination of those American-flag lines, present or potential, whose operating costs parallel those of Isbrandtsen. Such a result would be repugnant to the ultimate purposes stated in the title of the act which include 'the purpose of encouraging, developing, and creating a naval auxiliary and naval reserve and a merchant marine to meet the requirements of the commerce of the United States with . . . foreign countries.' The dual rate system here, on the other hand, is consistent with that purpose. The spread between contract and non-contract rates in the proposed system, based in part on the percentage by which Isbrandtsen most frequently underquotes conference tariff rates will reasonably enable the conference to meet Isbrandtsen's competition *without*, as in the method of uniform conference rate reduction preferred by Isbrandtsen, eliminating a *single* American carrier from the trade." (Italics those of the Board.)

In practical terms, rate reductions, in an effort to meet Isbrandtsen's levels, offered a less attractive solution to JAGFC than did the opening of rates, *i. e.*, the suspension of Conference control of rates so as to leave each line, Conference and non-Conference, in unrestricted rate competition. In either case the result would be a rate war and potential economic disaster.

By December 24, 1952, JAGFC had determined to solve its problems by filing a detailed statement (R. 153-206) of its proposal to institute the dual-rate system pursuant to the Board's then recently promulgated General Order 76, § 3 (R. 72),[7] which would permit such a proposal to become effective after 30 days unless, on the basis of objections or of its own motion, the Board should postpone its effectiveness. The system then proposed, with modifications subsequently directed by the Board, is the system now before this Court. Its details are set forth below under a separate head. Isbrandtsen and the Department of Justice protested and requested postponement of the system pending the outcome of a hearing on their protests. The Board granted the request for a hearing but denied the postponement.

The court below, by interlocutory injunction in an earlier review, stayed so much of the Board's order as denied the postponement and enjoined JAGFC from instituting the system.[8]

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[7] 46 C. F. R. § 236.3, 17 F. R. 10175, 17 F. R. 10560.

[8] The court announced in chambers on February 3, 1953, that it was of opinion the interlocutory injunction should be granted. The order granting same was made and filed on March 23, 1953. The court's final order in that proceeding set aside so much of the Board's order as had been stayed and enjoined the Conference

Thus, in March 1953, after the interlocutory injunction had been announced JAGFC found itself faced with an indefinite postponement of the institution of its dual-rate system.

A rate war, which was under the circumstances inevitable, actually came to pass. JAGFC, deprived of its only defense, and unable further to endure the loss of traffic, on March 12, 1953, opened rates on ten major traffic items, and on succeeding dates in the spring of that year opened rates on most items of importance in the Japan-Atlantic and Gulf trade. The result was a rate war in which rates, utterly lacking in stability, plunged about 60% to 70%, and in some instances even below loading and discharge costs (R. 30-31). The effect of this rate war upon the shippers and the commerce of the United States generally was catastrophic, as merchants were no longer able to fix prices for necessary advance periods (R. 32).

D. The Proposed Dual-Rate System.

The dual-rate system which JAGFC proposed to reinstitute was adopted after a study extending over approximately two months, during which JAGFC compiled an entirely new tariff of proposed contract and non-contract rates (Tariff No. 30).

The new contract rates were almost uniformly lower than the corresponding rates under the single tariff then currently in effect (R. 29). A 9½% spread be-

from instituting the dual-rate system until the Board should specifically approve thereof pursuant to § 15 of the Shipping Act. *Isbrandtsen Company, Inc.* v. *United States*, 211 F. 2d 51, cert. denied *sub nom. Japan-Atlantic & Gulf Freight Conference* v. *United States*, 347 U. S. 990 (1954).

two contract and non-contract rates was arrived at for the reasons set forth in the Board's Report (R. 32-34, 62, 64). To avail themselves of the contract rates, the shippers, whether buyers or sellers, would have to agree to ship only on vessels of Conference Members—an agreement subsequently modified by the Board to exclude refrigerated cargoes in which Ishrandtsen, for lack of equipment, could not compete with Conference Members (R. 203, 205, 76).[9]

At the same time the Conference Members agreed to carry the shipper's cargo at contract rates so far as their regular services are available and "to maintain a shipping service which shall be adequate to meet the reasonable requirements of the commerce".[10]

Furthermore, if the vessels of the Members should be unable to provide space within a stipulated notice period, the shipper could use non-Conference vessels without liability. This right, it should be observed, is not the shipper's exclusive remedy in such a situation, for if the Conference Members have failed to perform their obligations, they are still responsible for damages resulting from any breach (R. 204).

The contract rates may be reasonably increased, but only at the end of the second full month after the month during which notice of increase shall be given (R. 203), so that the shipper has a firm com-

[9] The Board's explanation for the changes in the contract form appears in the Report (R. 63, 65-66, 68-69).

[10] The court below mentioned only the carriers' obligation stated in Article 2, of the contract and on that basis held that the shipper's contract was "almost illusory" (R. 247; 239 F. 2d at 940). Apparently the court overlooked the provisions of Article 4 (R. 204).

nitment as to the rate for a minimum of two months; but the shipper has the right to terminate the contract on three months written notice, as do the Conference Members (R. 205).

If the shipper makes any shipment in violation of the contract, he agrees to pay as liquidated damages 50% of the freight which he would have paid had the shipment been made on a vessel of one of the Conference Members at contract rates (R. 204, 205). This is the provision which looms so large in the opinions of the court below.

E. The Board's Decision.

By the time the final order of the Court of Appeals on the first review was entered, the hearings before the Board's Examiner had been completed. The record thus compiled consisted of more than 4,500 pages of testimony and in excess of 150 exhibits.

After all available intermediate administrative procedures had been pursued to finality (R. 22-23), the Board issued its report, dated December 12, 1955 (R. 19-69).

After a narrative statement of its findings of fact (R. 23-37), the Board's Report completely reviewed the judicial and administrative decisions concerning dual-rate systems (R. 38-60), and concluded that the dual-rate system is not illegal *per se* and should not be disapproved unless, upon the facts, the system would offend against § 15 of the Shipping Act (R. 60).

The Board took as its guiding principle the statement by this Court in *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 304 (1937), of the administrative determination to be made in such cases (R. 44, 67). The Board found the harmful effects of rate instability on United States foreign commerce and the merchants engaged therein as follows (R. 32):

> "Many Japanese shippers have requested the conference to close rates and to end the rate war. The resultant instability has affected the smooth flow of commerce between Japan and the United States; has raised a threat that customs duties in the United States might be increased; has affected the value of inventories of Japanese goods in the United States; has caused requests for postponement of shipments by F. O. B. buyers in the United States, since such buyers assume the risk of fluctuating freight rates. Prices for the sale of Japanese goods are often fixed by the importers in the United States as much as six months in advance of their arrival in the United States."

The Board also found that Isbrandtsen for several months had participated in the free-for-all rate cutting which is characteristic of a rate war and later attempted to stabilize rates at about 50% of the levels of JAGFC's pre-rate war tariff. The Board concluded that the instability of rates thus created was not in the interests of the maritime commerce of the United States and justified resort by the Conference to a dual-rate system which would introduce a stable rate structure for this commerce. The Board further found that after institution of the dual-rate system Isbrandtsen, far from being excluded from the trade, would carry 10% or more of the cargo moving in the Japan-Atlantic and Gulf trade and that, "when com-

pared with the lesser average percentage [about 6%] which will be enjoyed by the conference lines; Isbrandtsen's 10 percent would be at least an equitable share of the trade" (R. 34-35, 62).

After reviewing the effect of the proposed 9½% spread upon shippers and carriers, the Board concluded that the differential was reasonable and not unjustly discriminatory with respect to either shippers or carriers (R. 62-64). It concluded, indeed, that the effect of the proposed system, by relieving the pressure on JAGFC to meet Isbrandtsen's rate competition, would create greater stability of rates and service, facilitate forward trading by shippers, and decrease the threat of rate wars (R. 61-62).

The Board therefore found that the agreement for the dual-rate system, under the criteria of § 15, should be approved, subject to modification of the proposed form of contract with shippers to which reference has been made.

The Board's order of January 10, 1956 (R. 75-76), which superseded and cancelled its earlier order of December 21, 1955 (R. 73-74), approved under § 15 the JAGFC dual-rate agreement, modified to the extent hereinabove indicated.

On December 19, 1955, Isbrandtsen filed in the court below its petition to review the Board's Report and the Orders entered thereon (R. 2-18). The United States was a respondent pursuant to 64 Stat. 1130, 5 U. S. C. § 1034, but, appearing by the Department of Justice (which had participated in the proceedings before the Board in opposition to JAGFC), joined Isbrandtsen in attacking the Board's Order.

The Secretary of Agriculture, who had intervened in the proceeding before the Board in opposition to the position of JAGFC, likewise intervened in the proceeding for review and joined in the brief of the Department of Justice. The Board was made a respondent pursuant to Rule 38(a) of the Court of Appeals, and JAGFC intervened by leave of the court. Both supported the Board's Order.

The final decision of the Court of Appeals, rendered almost four years after JAGFC resolved to file its statement under General Order 76, set aside the Board's approval and rested squarely on the proposition that § 14, Third, of the Shipping Act prohibits dual-rate systems (R. 241-248; 239 F. 2d at 936-939).

F. The Opinions Below.

Two opinions were rendered below. Fahy, Cir. J., wrote the opinion of the court which we shall refer to as the principal opinion; and Washington, Cir. J., wrote a concurring opinion in which all of the judges concurred. The principal opinion held that it could not substitute its judgment on the facts for the judgment of the Board (R. 243; 239 F. 2d at 937-938) and that the court might agree with the Board that the objective of re-establishing and maintaining stability of rates and services is consistent with the purposes of the Act (R. 241; 239 F. 2d at 936), and, "True it is, as the Board urges with much persuasion, the dual-rate system may be very potent in promoting stability and regularity of service and may be warranted by competitive considerations; * * *." (R. 242; 239 F. 2d at 937). Further, the court stated that the dual-rate system is not one of the methods spe-

cifically condemned by § 14, as are deferred rebates and fighting ships (R. 243-244; 239 F. 2d at 938), and that it had found in the legislative history of the Act no indication of an explicit intention by Congress to outlaw the dual-rate system as is found with respect to deferred rebates and fighting ships (R. 245; 239 F. 2d at 938).

The court held that since the non-contract rate is charged for failure to enter into a contract rather than for actually shipping via a non-conference carrier, "the higher rate constitutes retaliation because it is charged for failure to contract with the Conference. Section 14, Third, applies not only to retaliation for shipping by another carrier but for 'any other reason,' which would include failure to enter into the exclusive contract arrangement" (R. 242; 239 F. 2d at 937). The court also said on this point: "[B]ut when at the same time the system constitutes retaliation and is also discriminatory it runs into the barrier of section 14, Third, however desirable it otherwise might be" (R. 242; 239 F. 2d at 937).

After mentioning the cases decided by this Court which are discussed in our Second Point, *infra*, the court disposed of them as follows: "From this situation in the courts the Board contends that the dual-rate system has not been considered invalid per se, otherwise the courts would have disposed of these cases, on that ground. This position is an arguable one; but the fact is that the cases do not decide the point" (R. 244; 239 F. 2d at 938).

The concurring opinion, after stressing the view that the dual-rate system is, as a matter of law, retaliatory, expressed the opinion that the legislative

history of the Shipping Act, which indicates that the Committee which reported on it condemned deferred rebates and fighting ships, but not dual-rate systems, is not entitled to weight for the reason that the type of shipper's contracts employed in 1913, during the Congressional investigation, were different from the type of contracts now employed. Judge Washington found that the 1913 contracts were firm as to price and the obligation of the carriers to transport, whereas the shipper's contract today is "almost illusory" and the rates are subject to increase. Further, he found that in the 1913 contracts there was no provision for liquidated damages, and that "these differences are dispositive of the Board's principal argument" (R. 246-248; 239 F. 2d at 939-940).

SUMMARY OF ARGUMENT

I

The Statutory Language

No national policy accords to antitrust concepts an overriding effect upon statutes providing administrative regulation of specific industries.

An examination of the Shipping Act as a whole demonstrates that Congress concluded that our ocean-borne commerce could prosper only under supervised private control of competition by conferences. Shippers, carriers and the public generally would thus be protected from any improper practices of the conferences by the power of the Board to strike down action violative of the standards laid down by the

Act. The Act committed to the Board under such standards a defined power of discretion, but carved out of this broad discretionary power three limitations. These are contained in the first three subdivisions of § 14 of the Act, which condemn as illegal *per se* very specifically defined practices in which carriers are forbidden to engage on pain of heavy fines.

The first subdivision clearly defines and condemns "deferred rebates". The second clearly defines and condemns the "fighting ship". The third is the one upon which the court below predicated its decision that the dual-rate system had been rendered illegal *per se* by the Shipping Act. It reads as follows:

> "Sec. 14. That no common carrier by water shall, directly or indirectly * * *
>
> * * * * *
>
> "Third: Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason."

Subdivisions First and Second clearly treat of and prohibit objectionable *rate* practices. The foregoing language of Subdivision Third does not even mention rates, whether on a single or a dual standard, or contracts with shippers for exclusive patronage. The Court of Appeals could find no specific prohibition of the dual-rate system (R. 243-244; 239 F. 2d at 938).

We contend that Subdivision Third deals with types of carrier practices having no relation at all to freight

rates which are dealt with expressly in other sections of the Act. A specific type of practice is mentioned, *i. e.*, retaliation by refusal of space accommodations when such are available—the denial of a common carrier facility or service. It has nothing to do with rates. We contend that the otherwise vague language, "resort to other discriminating or unfair methods," takes on meaning only by reference to the specifically enumerated objectionable practice: in short, that, in the light of the entire Act, its design and history, this is a clear case for the application of the *ejusdem generis* rule.

A suggestion as to the types of practices which are proscribed by Subdivision Third when pursued in retaliation for shipper's conduct may be garnered from items (b) and (c) of § 14, Fourth, *i. e.*, discrimination in the loading and landing of freight in proper condition or the adjustment and settlement of claims. Such interpretation gives reasoned effect to the *ejusdem generis* rule since it imports the refusal to receive and properly deal with cargo in return for the refusal to ship cargo.

This interpretation lends symmetry to § 14, in contrast with the incongruity of the Section when interpreted in accordance with the opinion below. If the dual-rate system is, in and of itself, a discriminating or unfair method in retaliation for the shipper's employment of competitive tonnage, then *a fortiori* the deferred rebate, specifically proscribed in Subdivision First, is a discriminating or unfair method similarly in retaliation. Subdivision First would then become surplusage.

The suggestion in the opinions below, that the charge of a higher rate to a non-contract shipper is, as a matter of law, a retaliation against him because he did not contract, appears erroneous. In normal course, anyone who contracts and gives a required consideration expects to obtain advantages not enjoyed by one who does not contract and give the consideration. This truism applies to exclusive patronage contracts, as well as others. Such conduct is not retaliatory *per se*. Before the conduct of the vendor toward a non-contractor may be deemed retaliatory, additional facts must be found. If the less advantageous treatment of a non-contractor is reasonably necessary in the conduct of the vendor's business or in the public interest and no motive of inflicting injury is present, no retaliation exists. Findings of these factual and economic aspects of the practice should, as to ocean carriers, be made by the Board. If it finds the practice to constitute retaliation, the *per se* prohibition attaches, but not otherwise. The court below gave no effect to the findings of the Board with respect to the economic necessity, in this case, of a dual-rate system and of the reasonableness of that system. Those findings are inconsistent with the concept of retaliation. Nevertheless, the court below, ignoring these findings, held as a matter of law that the charge of the higher rate to the non-contracting shipper constitutes retaliation and as such is prohibited by the Shipping Act.

The opinion below also found a separate element of illegal retaliation in the liquidated damages provision of the exclusive patronage contract. We submit that if the dual-rate system is not otherwise illegal *per se*, the inclusion in the contract of a reasonable provision

for liquidation of damages imports compensation for the injury done, not retaliation. If the liquidated damages provision is penal rather than compensatory, it will, of course, not be given effect, irrespective of whatever motive may have animated it.

II

The Decided Cases

We submit that prior decisions of this Court are authority for the proposition that the dual-rate system is not illegal *per se*.

United States Navigation Co. v. *Cunard S. S. Co.*, 284 U. S. 474 (1932), involved a complaint by a non-conference competitor seeking an injunction against a conference dual-rate system with coercive differentials. The complaint charged violation of the antitrust laws. This Court held that the complaint should be dismissed since the Shipping Act, *pro tanto,* superseded the antitrust laws, and the determination whether a dual-rate system violates the Shipping Act, including § 14, was for the primary jurisdiction of the Board on all the historic and economic facts. The Court did not withhold from the Board's jurisdiction the question whether the dual-rate system is retaliatory. The dismissal of the complaint would not have followed merely because it stated no claim for relief under the Sherman Act, if the facts alleged constituted a *per se* violation of § 14, Third, or any other section of the Shipping Act. This is true both as a matter of basic principles of equity jurisprudence and in accordance with the doctrine that in a case involving only a question of law, there is no call for the

application of the primary administrative jurisdiction rule (*Great Northern Railway Co.* v. *Merchants Elevator Co.*, 259 U. S. 285 (1922)).

The ruling in *U. S. Navigation Co.* was reaffirmed in an antitrust suit brought by the United States in *Far East Conference* v. *United States*, 342 U. S. 570 (1952). The dissenting opinion, which rested in part on illegality *per se* under § 14, Third (342 U. S. at 578-579), indicates that the issue was squarely before the Court.

Swayne & Hoyt, Ltd. v. *United States*, 300 U. S. 297 (1937), reviewed a decision by a three-judge statutory court that the dual-rate system, under any circumstances, was a violation of § 16 of the Shipping Act (18 F. Supp. at 27-8). This Court affirmed the decision, not on the ground that the dual-rate system was in and of itself a violation of § 16, but rather on the ground that the issue whether the discrimination involved was undue or unreasonable within the meaning of § 16 was for the Board to decide, and that in the case presented there was substantial evidence to justify the Board's conclusion that the particular system was unlawful on the facts presented. That this Court did not decide *Swayne & Hoyt, Ltd.*, without reference to § 14, is demonstrated by the footnote (300 U. S. at 307), in which the Court concluded that the dual-rate system did not, *per se*, violate that section. This footnote is holding, not dictum, since the Court could not have concluded that the Board had discretion under § 16 with regard to dual-rate systems if they were prohibited, *per se*, by § 14, Third.

III

The Administrative Interpretation

The Board has consistently condemned competition among carriers by means of rate cutting as inimical to our foreign commerce, where the rates of one of the competitors are generally fixed by deducting a given percentage from the corresponding rates of the other competitor or competitors. *Section 19 Investigation, 1935*; 1 U. S. S. B. B. 470 (1935); *Rates, Charges and Practices of Yamashita and O.S.K.*, 2 U. S. M. C. 14 (1939); *Cargo to Adriatic, Black Sea, and Levant Ports*, 2 U. S. M. C. 342 (1940). There is no provision of the Shipping Act which specifically prohibits such rate cutting practices. Accordingly, conferences which have experienced, or which have been threatened with, cut-rate competition have, over the many years since the adoption of the Shipping Act, employed the protective shield of the dual-rate system. These dual-rate systems have been attacked before the Board many times.

Without exception, the Board's decisions have held that the dual-rate system is not illegal *per se*. *Eden Mining Co.* v. *Bluefields Fruit & Steamship Co.*, 1 U. S. S. B. 41, 46, 48 (1922); *Rawleigh* v. *Stoomvaart*, 1 U. S. S. B. 285, 293 (1933); *Contract Routing Restrictions*, 2 U. S. M. C. 220 (1939); *Pacific Coast European Conference Agreement*, 3 U. S. M. C. 11 (1948).

This long and consistent administrative interpretation is entitled to weight. *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 472-473 (1915).

IV

The Legislative History

The Congressional purposes disclosed by the legislative history of the Shipping Act lend persuasive support to the interpretation we urge.

The enactment of the Shipping Act, 1916, was preceded by a thorough investigation by the Committee on the Merchant Marine and Fisheries of the House of Representatives (Alexander Committee). Although this investigation was undertaken in an atmosphere of hostility to combinations of ocean carriers (H. R. Doc. 805, 63rd Cong., 2d Sess. 8-10 (1914)), the conclusion was reached that rate making by agreement was necessary to secure advantages to American merchants which are enjoyed by their foreign competitors, and that abolition of conferences would not result in free competition, but in monopoly probably more complete than existed by virtue of such agreements (*id.* at 416). The Committee, however, recommended that all such agreements should be subjected to publicity and to regulation by an administrative agency so that unless they complied with legislative and administrative requirements they should be stricken down (*id.* at 418-420). The Committee did, however, recommend that certain abuses found by it to exist should be absolutely prohibited (*id.* at 421). The enumerated abuses make no reference to exclusive patronage contracts or dual-rates, notwithstanding that the Committee was fully aware of the conference practice of contracting with shippers for exclusive patronage in return for a reduced rate (*id.* at 290).

This legislative history is clear that the Congressional purpose was to endorse the conference system of rate making under proper controls as a beneficial instrumentality of United States commerce. It equally clearly was the purpose to withdraw from the Board's discretion by precise prohibitions certain abusive practices, while leaving to conferences as their protection against cut-throat non-conference competition all other devices, including the dual-rate system, so long as they should not in their details of application be found by the Board to be violative of the Act.

The Board, in its annual reports, has repeatedly informed Congress of its decisions in dual-rate cases. Nevertheless, although Congress has on a number of occasions amended the Shipping Act and has reviewed our national shipping policy and adopted a number of far-reaching statutes, it has never indicated, either in its committee reports or in its enactments, that the dual-rate system is illegal.

ARGUMENT

FIRST POINT

Section 14, Third, of the Shipping Act does not render the dual-rate system illegal *per se*.

(a) The Economic Background of the Shipping Act.

The Shipping Act, 1916, reflects Congressional policy, first embodied in the Interstate Commerce Act of 1887, to subject to regulation those industries in which

the presuppositions of a free competitive order are not present or in which competition would produce economically or socially undesirable results. The Shipping Act, moreover, as contrasted with the Interstate Commerce Act, deals with transportation which by definition involves more than one sovereignty in the course of each voyage. By virtue of our treaties of friendship and commerce, our government cannot, by the issuance of certificates of convenience and necessity, limit the number or character of the vessels of friendly countries which serve our commerce. The only feasible limitation would be the decrease of the number of American-flag vessels serving our ports—a limitation which runs counter to the declared policy of both the Shipping Act, 1916, and the Merchant Marine Act, 1936. There is, therefore, no governmental control upon oversupply of tonnage.

Furthermore, there can be no governmental fixing of rates because the minimum fixed for a particular voyage by one country might well exceed the maximum fixed by the other country. Only contacts at the diplomatic level could solve such an impasse. The result is that neither the United States nor any other nation has ever adopted any law authorizing any governmental agency to prescribe reasonable foreign ocean rates.[11] In all maritime nations the problem

[11] This statement is fully applicable to rates of individual carriers. With respect to conferences, while the Board has no authority to fix or pass upon the reasonableness of conference rates, it holds a powerful restraining hand upon conference rate action because of its authority to disapprove any conference agreement, and thus cause the dissolution of the conference, if it finds such agreement to operate to the detriment of the commerce of the United States (Shipping Act, § 15). *Edmond Weil v. Italian Line*, 1 U. S. S. B. B. 395, 398-399 (1935); *Section 19 Investigation*, 1 U. S. S. B. B. 470, 492-493 (1935); *Pacific Forest Industries v. Blue Star Line*, 2 U. S. M. C. 54 (1939); *Pacific Coast European Rates and Practices*, 2 U. S. M. C. 58 (1939).

has been solved by permitting the various ocean carriers engaged in each trade to form conferences which determine the rates to be charged by the conference members. In many nations these conferences act without government control, it apparently being their thought that enlightened self-interest would prevent carriers from injuring their shippers. In the United States, the Shipping Act, 1916, solved the problem by authorizing the organization of conferences and other groups of carriers, but required complete publicity of all agreements among carriers and subjected them to control and to regulation by the Board.

(b) The Role of § 14, Third, in the Regulatory Program.

It is only natural in the light of the foregoing that the very heart of the legislation adopted for the regulation of shipping should be a provision subjecting agreements and arrangements among ocean carriers in derogation of free competition to administrative sanction and visitation, and exempting approved agreements from the antitrust laws. Thus the very core of the Shipping Act is to be found in § 15. The first paragraph is the publicity paragraph, as follows:

> "That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; *giving or receiving special rates,* accommodations, or other special privileges or advantages; *controlling, regulating, preventing,*

or destroying competition; pooling or apportioning earnings, losses or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner *providing for an exclusive, preferential, or cooperative working arrangement.* The term 'agreement' in this section includes understandings, *conferences,* and other arrangements." (Italics supplied.)

The second paragraph gives the Board control over the effectiveness of any such agreement:

"The board *may by order disapprove,* cancel, or modify *any agreement,* or any modification or cancellation thereof, whether or not previously approved by it, *that it finds to be* unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, *and shall approve all other agreements,* modifications, or cancellations." (Italics supplied.)

Under this paragraph of § 15 agreements *may* be condemned by the Board because they are "unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports or between exporters from the United States and their foreign competitors." Here clearly lies a field for the exercise of administrative discretion in determining what discrimination is unjust and what unfair. Agreements *may* also be condemned if the Board finds that they "operate to the detriment of the commerce of the United States". Here again is substance particularly

fitted for the application of administrative *expertise*. Finally, agreements *may* be disapproved if the Board finds them "to be in violation of this Act". As we shall see, certain agreements and conduct thereunder may be in violation of the Act only if such agreements or conduct be found by the Board to be unjustly or unduly preferential or prejudicial or discriminatory (§ 14, Fourth, § 16 and § 17). As to this class of statutory violation, there is latitude for the exercise of administrative judgment.

There remains, however, a single class of agreements and conduct as to which Congress withheld from the Board any area of discretion. This is the class of agreements and acts which are declared illegal *per se* by § 14, First, Second and Third.

All agreements which the Board does not find to be in a prohibited category, and which the Board does not disapprove on one of the discretionary grounds, *shall be approved*. The presumption would seem to be in favor of approval, since no order or finding is prerequisite thereto; whereas specified findings must be made as a condition to disapproval, modification or cancellation. Further, under § 15, "Agreements existing at the time of the organization of the * * * [Board] shall be lawful until disapproved by the * * * [Board]."

From the foregoing considerations the grand design of the Shipping Act clearly emerges. This design contemplates combined action by carriers in the full glare of publicity, but subject at all stages to regulation by the Board, with three courses of conduct withheld from the Board's approbative power—three ex-

ceptions to the general program of promoting the public interest in ocean transportation by combined action of carriers under administrative regulation and control.

We submit that these three exceptions, being in derogation of the general legislative grant of discretion to the Board, should not be judicially extended beyond the meaning of the statutory language according to its usual acceptation.

In view of the comprehensive categories of agreements restrictive or destructive of competition which may be approved by the Board and so removed from the compass of the antitrust laws, §15 clearly evinces a considered rejection of normal antitrust philosophy as a criterion for ocean carrier regulation.

(c) Section 14, Third, Does Not Apply to Dual-Rate Systems or Any Rate Practices.

§ 14, Third, provides that no common carrier by water shall, directly or indirectly:

> "Third. *Retaliate against any shipper by* refusing, or threatening to refuse, space accommodations when such are available, or *resort to other discriminating or unfair methods, because such shipper has patronized any other carrier* or has filed a complaint charging unfair treatment, *or for any other reason.*" (Italics supplied.)

The court below interpreted the above italicized words as a proscription of the dual-rate system. It is our contention that § 14, Third, does not deal with rates or rate practices at all, but with an entirely different type of carrier practice which might, under certain circumstances, amount to retaliation.

All would agree that this provision prohibits a carrier from refusing or threatening to refuse space accommodations when such are available, in order to injure a shipper for past acts inimical to the carrier's interests. All must also agree that this provision lacks any specific mention of contracts, or rates, dual or otherwise. Accordingly, a heavy burden must rest upon him who would conjure from the inapt phrase, "resort to other discriminating or unfair methods," a description of the dual-rate system in a section of the statute which otherwise defines with exceptional particularity conduct which is illegal *per se*, and which makes any violation a misdemeanor punishable by a fine of as much as $25,000.00. It is axiomatic that penal statutes must not be stretched so as to bring within their purview any acts not specified by the language employed by the legislature. *Yates* v. *United States*, 354 U. S. 298, 77 S. Ct. 1064, 1 L. Ed. 2d 1356 (1957); *United States* v. *Resnick*, 299 U. S. 207, 209 (1936); *United States* v. *Wiltberger*, 5 Wheat. (18 U. S.) 76, 95-96 (1820). The point need not be labored that the phrases, "other discriminating or unfair methods," and "for any other reason," must be placed within limits fixed by the requirements of certainty imposed by the penal aspect of § 14, and logically required by the context of the entire section and its position in the regulatory framework created by the Shipping Act.

The clear and unambiguous prohibition of retaliatory denial of shipping space contained in § 14, Third, fits symmetrically into the pattern of § 14. Subdivision First of that section prohibits the deferred rebate. This competitive rate device in ocean transportation was so precisely defined that no uncertainty

can, with ordinary ingenuity, be created regarding its exact limits. By Subdivision First, common carriers by water are prohibited to—

> "First. Pay, or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow, a deferred rebate to any shipper. The term 'deferred rebate' in this Act means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement."

By this provision Congress prohibited the most potent rate device for securing the exclusive patronage of a shipper to a particular carrier or group of carriers. By conditioning the payment of the rebate upon exclusive patronage not only during the period of rendition of the service, but also during a period of deferment, and by continuing the deferred rebate practice for successive periods of transportation service, the carriers ensured that they would at all times have in their pockets large sums of money by way of earned rebates belonging to the shipper, which the shipper could recover only by continuing his exclusive patronage of the carriers. Thus the shippers were made continuously dependent upon the carriers period after period without any opportunity to disengage themselves without substantial financial loss.

The very precision with which this competitive device was defined would seem to signify that *it was not the goal of exclusive patronage as such which consti-*

tuted the evil to be abolished, but rather a very pernicious rate stratagem for securing exclusive patronage. The deferred rebate is illegal under § 14, First even when divorced from exclusive patronage. It is banned when employed "for any other purpose."

Subdivision Second named and described a competitive rate practice which was declared to be unlawful, namely, the fighting ship—the quotation of exceptionally low rates applying to a ship which is deliberately scheduled to take cargo at the same time and port as the vessel of the non-conference competitor.

Subdivision Third forbade the use by carriers of the practice of refusing or threatening to refuse space accommodations when such are available, in retaliation for patronage of another carrier. As will appear below from our discussion of the legislative history the Alexander Committee found that the practice of refusing or threatening to refuse space accommodations was used in conjunction with the deferred rebate system as a reinforcing method of requiring exclusive patronage from shippers. The prohibition of this practice when used in retaliation, like the prohibitions contained in subdivisions First and Second, is unqualified and precise. *It clearly does not encompass any practice with respect to freight rates.*

Subdivision Fourth of § 14 is to be contrasted with subdivisions First and Second, and that portion of subdivision Third which we have considered immediately above. This subdivision provides that no common carrier by water shall:

> "Fourth. Make any *unfair* or *unjustly* discriminatory contract with any shipper based on

the volume of freight offered, or *unfairly* treat or *unjustly* discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims." (Italics supplied.)

Here we find no *per se* prohibition, but rather the creation of offenses which require the application of administrative *expertise* to the facts of each particular case.

It is significant that Subdivision Fourth conditionally condemns volume contracts; but in clause (a) it also *conditionally condemns discrimination in the matter of cargo space accommodations or other facilities.* It would thus appear that refusal of space, when not practised as a method of retaliation was to be an offense only if in the judgment of the administrative agency it amounted to unfair treatment or unjust discrimination.

Clauses (b) and (c) of Subdivision Fourth conditionally condemn two other types of discriminatory conduct. They condemn unfair treatment or unjust discrimination in the matter of "(b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of freight claims." Here we have the key to the meaning of "other discriminating or unfair methods" as used in Subdivision Third. They, like the refusal of cargo space, constitute practices relative to the physical facilities of a common carrier and its physical handling of the goods transported. In Subdivision Fourth these methods are banned when unfair or unjust. In Subdivision Third they are proscribed *per se* if practiced in retaliation against a shipper.

The penal nature of § 14 underscores the appropriateness of applying the *ejusdem generis* rule to give definite meaning to the otherwise all-inclusive character of the "other" methods embraced within subdivision Third. We submit that the thrust of subdivision Third is toward the prohibition of denial to shippers of common carrier facilities for various reasons. As in the case of subdivision First, it is the means, not the end, which is the evil against which the legislation was directed.[12] The obvious facility to be denied is available space accommodation. By application of the *ejusdem generis* rule, the forbidden "resort to other discriminating or unfair methods" would be limited to other denials of common carrier facilities. If illustrations are required of other such facilities which may be denied, they may be found in the parallel provisions of items (b) and (c) of subdivision Fourth, *i. e.*, the loading and landing of freight in proper condition, and adjustment and settlement of claims.

We submit that these are the reasons why subdivision Third speaks of "methods" and not of "contracts" and "rates". This choice of words was deliberate. Nowhere else in this Act, which is largely concerned with rate matters, is a rate practice designated a "method".

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[12] The vice of refusing available shipping space was particularly abhorrent to the drafters of the Shipping Act. Not alone do we find this method of discrimination absolutely condemned by § 14, Third, when used in retaliation, and conditionally condemned by § 14, Fourth, when unfairly and unjustly practiced. We also find that § 36, 39 Stat. 738, 46 U. S. C. § 834, authorizes the Secretary of the Treasury to refuse clearance to any vessel whenever it refuses to accept cargo from a citizen of the United States unless it has no available space accommodation.

The interpretation of § 14, Third, for which we contend, does not leave the subject of rates and contracts beyond the purview of the statute. Subdivision Fourth deals with unfair or unjustly discriminatory contracts based on the volume of shipments. Section 17 (46 U. S. C. § 816) forbids any common carrier by water in foreign commerce to "demand, charge, or collect any rate, fare, or charge which is *unjustly* discriminatory between shippers or ports, or *unjustly* prejudicial to exporters of the United States as compared with their foreign competitors." Whenever the Board finds a violation of the section, it is authorized to alter the rate involved "to the extent necessary to correct such *unjust* discrimination or prejudice" and to order the carrier to discontinue "any such *unjustly* discriminatory or prejudicial rate, fare, or charge." Similarly, § 16, First (46 U. S. C. § 815, First), forbids common carriers by water—

> "To make or give any *undue* or *unreasonable* preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any *undue* or *unreasonable* prejudice or disadvantage in any respect whatsoever." (Italics supplied.)

Finally § 15 (46 U. S. C. § 814) authorizes the Board to disapprove any carrier agreement upon the making of one of three findings with respect thereto. One such finding is that the agreement is—

> "* * * *unjustly discriminatory or unfair as between carriers, shippers,* exporters, importers, or ports, or between exporters from the United States and their foreign competitors * * *." (Italics supplied.)

Thus our construction of the statute does not immunize conference rate practices against attack. Under § 14, First and Second, the deferred rebate and the fighting ship are illegal *per se*. Under § 14, Fourth, § 15, § 16, First, and § 17, discriminations in rate practices are illegal if "undue" or "unjust" or "unreasonable."

It is our view that the ultimate demonstration that § 14, Third, should not be construed so as to apply to rate matters rests on the incongruous result which would follow from such construction. It would render surplusage all of § 14, First, which outlaws deferred rebates as a means of obtaining exclusive patronage. Then Congress' meticulous fashioning of the definition of a "deferred rebate" will have no conceivable purpose. If § 14, Third, outlaws *per se* the dual-rate system as a method of retaliation against shippers who have patronized a competitor, then, *a fortiori*, § 14, Third, would outlaw the deferred rebate system. The deferred rebate system is definitely a means of discriminating against a shipper for employment of non-conference tonnage in a manner which is not at all true of the dual-rate system.

(d) Conceding *Arguendo* That § 14, Third, Can Apply to Rates, It Still Does Not Outlaw the Dual-Rate System.

For the purpose of the discussion under this head we assume that "other methods", as used in § 14, Third, may be interpreted as being sufficiently broad and ambulatory to include rate matters. Still that subdivision does not outlaw the dual-rate system.

The court below held that, although in terms the non-contracting shipper is charged the higher rate because he has not contracted, in reality the charge of the higher rate is retaliatory for patronizing another carrier. Yet the court recognized that this view of the dual scale of rates does not accord with the facts; for the lower rate is charged to a contract shipper even though, up to the moment of contracting, he may have patronized non-conference vessels exclusively; and the higher rate is charged to the non-contract shipper even though he may never have patronized an outside line. So the court stated that in any event the higher rates retaliate against a shipper for failure to sign the contract and this is retaliation "for any other reason" within the intendment of § 14, Third (R. 242; 239 F. 2d at 937).

In thus ruling the court erred in two respects: It made upon its own initiative a factual and economic determination that such a carrier practice is retaliatory, and it applied this conception of the term "retaliate" in such manner as to reject the Board's findings.

The verb "retaliate" has no established common law significance, nor is it a word of art in statutory draftsmanship. No instance of its interpretation in either context has been found. In common parlance it is a concept without clear-cut boundaries except for the connotation of vengeance—a deliberate reciprocation of injuries. Acts that may be retaliation in one case, may very readily not be retaliatory in another. Obviously the court below would not include in its concept of retaliation every situation in which A con-

tracts with B, but declines to extend the same privilege to C-Z in the absence of a willingness on their part to assume the same obligations that B has agreed to assume.

Turning to requirements contracts, it is equally plain that if the vendor makes no price concession to those who will contract for the purchase of their requirements, there is no retaliation against others. If, however, the element of discount in return for exclusive patronage is introduced, we submit that no one can dogmatize that the arrangement does or does not "retaliate" against the customer who does not contract for his requirements. One must first ascertain as a fact what motive is involved in giving the discount to the contractor and withholding it from the non-contractor. If the arrangement is motivated solely by the desire to secure to the seller the economic benefit of certainty of demand, there can be no retaliation. If the motivating factor is to "get even" with the non-contractor for patronizing a competitor, there may, in a loose sense, be retaliation.

The conclusion inevitably suggests itself that the evaluation of a given fact situation as retaliatory or not should, under the regulatory program of the Shipping Act, be made by the Board. So interpreted, § 14, Third, would require an analysis by the Board of any method—refusal or threatened refusal of space accommodations when available, or any other discriminating or unfair method—in order to determine whether its employment in the case at hand was for the purpose of retaliating against the shipper. With respect to a denial of space accommodations, the statute is express. If the denial is retaliatory, it is illegal *per se* under § 14, Third; if not, it is barred under § 14, Fourth.

only if unfair or unjust. Who decides whether the denial of space was retaliatory? Obviously the Board. So, too, "other discriminating or unfair methods" are illegal *per se* under § 14, Third, if practiced as a means of retaliation; otherwise they are illegal under § 14, Fourth, § 15, § 16 or § 17 only if undue, unjust or unreasonable. Here also *it is obviously for the Board to decide whether or not as a matter of fact the purpose is retaliation.*

In making this determination, the Board should properly consider whether or not the "method" was employed in such fashion as to be reasonably essential to the successful conduct of the proponents' enterprises and reasonable in its effects upon shippers and competing carriers, and whether its employment furthers the statutory policy of the Act. If the answer to these questions is in the negative, there may be retaliation. Otherwise there can be no retaliation.

Only if retaliation be found as a fact, does the *per se* concept properly become operative. The courts should respect the Board's conclusion in this regard depending "upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions in respect of the shipping of foreign countries, and of other relevant circumstances, generally unfamiliar to a judicial tribunal, but well understood by * * * [the Board]; and with which that body, consequently, is better able to deal" (*United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 485 (1932)).

The Board refused to make a finding of retaliation. It refused to find that there is retaliation *per se*. (R.

57-58). It did find reasonable and proper business motives for the adoption of the dual-rate system which negative any conclusion of vengeful or retaliatory motivation:

> "* * * The contract shipper, however, by enabling the conference lines to estimate the amount of cargo available for carriage, and accordingly, to plan vessel sailings and space in a more economical fashion, aids those carriers in reducing unit costs of carriage, and thus, to improve their services to shippers" (R. 35).

and

> "We consider the inauguration of a dual rate system to be a necessary competitive measure to offset the effect of non-conference competition in this trade. * * *" (R. 60).

and

> "The dual rate system by creating a basic core of cargo on which the conference can rely for the period of the contracts, will eliminate, for that period, the pressure on conference lines to reduce rates to meet Isbrandtsen's lower rate competition and will thereby create greater stability of rates and service, facilitate forward trading by shippers, and decrease the threat of rate wars." (R. 61-62).

and

> "* * * The spread is, as to those commodities capable of being carried by both Isbrandtsen and conference vessels, large enough to furnish protection to the conference lines against inducements to shippers offered by Isbrandtsen and small enough to enable Isbrandtsen to remain competitive with the conference. * * *" (R. 62).

These findings of fact of the Board negative any inference of fact or any conclusion of law that any retaliatory motivation was present. The Board's findings clearly indicate that the Conference Members were merely endeavoring to induce shippers to use their vessels in the expectation that this inducement would offset in part the inducement offered by Isbrandtsen to shippers.

The court below completely upset these detailed findings of a motivation completely divorced from any punitive purpose directed against any shippers. Instead the court, without any factual basis and without reference to the Board's findings, held that, as a matter of law, charging a higher rate to a person who does not contract than to a person who does contract is retaliation (R. 242; 239 F. 2d at 937):

> "* * * Furthermore, even though the shipper has not patronized another the higher rate constitutes retaliation because it is charged for failure to contract with the Conference. Section 14, Third, applies not only to retaliation for shipping by another carrier but for 'any other reason,' which would include failure to enter into the exclusive contract arrangement."

Here we have a clear statement that the making of a higher charge to one who does not contract than is made to one who does contract is, as a matter of law, retaliatory. We submit that the court misconceived its function under the Act in discarding the findings and conclusions of the Board.

Perhaps the court's conviction that the dual-rate system is retaliatory *per se* rested upon underlying concepts expressed in the concurring opinion, that

the system "is being used to penalize a shipper because he has patronized another carrier or at least reserved the right to do so;" and that the higher rate and the liquidated damage clause are "two essentially penal provisions * * * both imposed to coerce shippers to refrain from using non-Conference carriers" (R. 246, 247; 239 F. 2d at 939, 940). Whereas the stated conclusions in the principal opinion merely ignored the findings by the Board, the observations in the concurring opinion are directly contrary to those findings, which demonstrate that neither the non-contract rate nor the liquidated damages clause is either coercive or penal.

Even, therefore, if § 14, Third, can be construed to deal with matters of rates, it cannot be read so as to proscribe the dual-rate system *per se*. Absent a Board finding of retaliatory motivation, a dual-rate system is to be judged under § 16 of the Act in accordance with the criteria prescribed by *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 304 (1937).

(e) No Violation of § 14, Third, Inheres in the Liquidated Damages Clause of the Shipper's Contract.

We submit that it is fundamental in this situation that if it be legally permissible for the Conference to enter into an exclusive patronage contract with a shipper, no element of illegality inheres in the provision for the payment of liquidated damages for the violation of the contract by the shipper. To hold that there may be a contract, but that the shipper may violate it without the payment of any damages would be in reality to hold that there may not be a contract at all. On the other hand, if it is proper

for the shipper to be held liable for provable damages, then there is no reason in law or in logic why the damages for breach may not be liquidated if their amount is difficult to prove and calculate. If, under the guise of stating liquidated damages, provision is inserted which is inordinately high as compared with the foreseeable loss, it will be denied enforcement as being unreasonable or penal, and the carriers will be relegated to collection of provable damages only. 3 Williston, Contracts (Rev. Ed. 1936) 2191-2194; Restatement, Contracts, § 339(1).

Of course, a stipulation for an unenforcible penalty would be a nullity. We believe that implicit in footnote 6 to the concurring opinion (R. 247, n. 11; 239 F. 2d at 940) is the concession that the liquidated damages in the shipper's contract adopted by JAGFC are not penal in nature. We shall below demonstrate that they are, indeed, reasonable.

A shipper's breach of his contract deprives a Conference Member of the opportunity to earn freight by carrying the cargo involved in the breach. Here the liquidated damages do not even take into account the real but unascertainable damages inflicted upon the stability of the Conference rate structure by one or a succession of contract violations by contract shippers. Instead they seek merely to compensate the members to a limited degree for the loss of revenue on the shipment lost to a cut-rate competitor.

The damages in such a case are analogous to dead freight. The measure of dead freight has been defined as follows in *The Rosemary*, 277 Fed. 674 (5th Cir. 1922). The Circuit Court of Appeals there

stated the holding of the District Court insofar as here relevant as follows (*id.* at 676):

> "* * * The court rendered a decree * * * awarding the appellee $22,478.95, that sum being the amount of dead freight on 487 tons of mahogany logs at $44 per ton, *less the ascertained cost of loading and unloading that amount of mahogany logs,* with interest from the date of completion of discharge at Gulfport of the Rosemary's cargo. * * *" (Italics supplied.)

In that case the shipper claimed, but did not prove, that the ship had saved a certain amount of time in port by reason of the shipper's omission to ship the goods in question. The Court of Appeals affirmed the ruling of the District Court as stated above and used the following language (*id.* at 679):

> "* * * As it was not made to appear that the charterer's failure to ship the amount of cargo stipulated for enabled the vessel to start on its voyage from Secondee sooner than it would have done, if the stipulations in that regard had been complied with, the above-mentioned claim that the vessel got the benefit of a saving of time to which it was not entitled is not well founded."

Hence in the absence of any showing by the shipper that the carrier saved ship's time by reason of his failure to ship, the carrier's damages are the contract freight less only the out-of-pocket expenses of loading and discharge. We also refer to: *The Gazelle,* 128 U. S. 474 (1888); *Steamship Company of 1912* v. *C. H. Pearson & Son Hardwood Co., Inc.,* 30 F. 2d 770, 773 (2d Cir. 1929); *New York & Cuba Mail S. S. Co.* v. *Guayaquil & Q. R. Co.,* 270 Fed. 200 (2d Cir. 1920), cert. dismissed *sub nom. Guayaquil & Q. R. Co.* v. *New York & Cuba Mail S. S. Co.,* 257 U. S. 642 (1921).

The record substantiates our claim that the damages as liquidated in the proposed JAGFC shipper's contract are really inadequate even on the dead freight basis. The Board found that the costs of loading and discharge in this trade amount to $8.50 a ton. The Board also found that when, during the rate war, rates had reached the level of $6.50 a ton, they were approximately 30% of pre-rate war rates (R. 31). This being so, it would appear that the pre-rate war rates must have been about $21.50 a ton. Upon these findings, dead freight or proper liquidated damages should have been at a minimum of $21.50 minus $8.50, or $13.00—an amount in excess of the 50% of the freight rate provided in the contract.

(f) Conclusion to First Point.

We submit that § 15 indicates that a competitive method such as the dual-rate system should be approved in the absence of the requisite findings for disapproval.

We submit that not only is the Shipping Act, and particularly § 14, Third, thereof, devoid of language apt to a *per se* prohibition of dual-rate systems; but, on the contrary, the language of § 15 contemplates the approval of dual-rate systems which are not, *in the opinion of the Board*, retaliatory against shippers or unjustly discriminatory against shippers or carriers.

The construction applied to the statute by the Court below not only lacks support in the literal language of the statute itself, but violates well-recognized canons of construction. It gives the broadest possible interpretation to a criminal statute. It renders a carefully drawn portion of § 14 surplusage. It ignores

the *ejusdem generis* rule. We submit that only a dire need for a forced and unnatural interpretation of a statute could justify the contravention of these well established guides to the proper reading of statutes. Here the need is, rather, for a construction in accordance with these rules to serve the public interest in attaining the objectives of the Shipping Act.

SECOND POINT

The decision below appears to be inconsistent with prior decisions of this Court.

We urge that the foregoing analysis of the Shipping Act itself, supported by our later consideration of its consistent administrative interpretation and its legislative history, will be persuasive to this Court that it should not depart from the determinations which it has already made with respect to the dual-rate system.

In three cases this Court has considered whether dual-rate systems are illegal *per se*. We submit that, carefully considered, these cases answer the question in the negative. Conferences generally have long considered these cases as authority for that proposition and so has the Board (R. 41, 44, 48, 50, 59-60). The court below referred to this contention but, after analysis of the cases, stated R. 244; 239 F. 2d at 938):

> "* * * This position is an arguable one; but the fact is that the cases do not decide the point. * * *"

United States Navigation Co. v. *Cunard S.S. Co.*, 284 U. S. 474 (1932), arose on a complaint by a

non-conference carrier seeking an injunction pursuant to the Sherman Act[13] and the Clayton Act[14] to restrain the respondent conference carriers from the employment of a dual-rate system in United States foreign trade. Since the case arose on motion to dismiss the bill, the allegations of coercion against shippers and exclusion of the complainant from the trade were taken to be true for the purposes of the decision (284 U. S. at 479-480). This Court held that the Shipping Act had *pro tanto* superseded the anti-trust laws; and that because questions of fact and discretion were involved in determining whether the Shipping Act had been violated, the matter was within the exclusive primary jurisdiction of the Board (*id.* at 485). The decree below dismissing the complaint was affirmed.

The opinion in *U. S. Navigation Co.* states clearly that the legality of a dual-rate system depends upon economic, business and competitive factors—that a factual issue is present. Thus, this Court said (284 U. S. at 485):

> "The act [the Shipping Act] is restrictive in its operation upon some of the activities of common carriers by water, and permissive in respect of others. Their business involves questions of an exceptional character, the solution of which may call for the exercise of a high degree of expert and technical knowledge. *Whether a given agreement among such carriers should be held to contravene the act may depend upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions in respect of the shipping of foreign countries,*

[13] 26 Stat. 209, 15 U. S. C. §§ 1-7.

[14] 38 Stat. 730, 15 U. S. C. §§ 12-27.

and of other relevant circumstances, generally unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade; and with which that body, consequently, is better able to deal. * * *" (Italics supplied.)

Again (284 U. S. at 487) the Court considered the contention that the Court should decide that, on the face of the statute, "the [dual-rate] agreement referred to in the bill of complaint cannot legally be approved", and rejected it in the following terms:

"* * * *A contention to that effect is clearly out of harmony with the fundamental purposes of the act* and specifically with the provision of § 22 authorizing the board to investigate *any* violation of the act upon complaint or upon its own motion and make such order as it deems proper. And whatever may be the form of the agreement, and whether it be lawful or unlawful upon its face, Congress undoubtedly intended that the board should possess the authority primarily to hear and adjudge the matter. For the courts to take jurisdiction in advance of such hearing and determination would be to usurp that authority. *Moreover, having regard to the peculiar nature of ocean traffic, it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications.*" (Italics supplied except as to "any" in the fourth quoted line.)

Lest it be contended that this Court was unmindful of § 14, Third, we quote from the opinion the following paraphrase of that section (284 U. S. at 483-484):

"* * * Section 14 prohibits retaliation by a common carrier by water against any shipper by

resort to discriminating or unfair methods because the shipper has patronized another carrier; * * *."

We submit that the language of this Court in *U. S. Navigation Co.* with respect to the dual-rate system is clearly to the effect that an agreement providing for such a system may be approved, disapproved or modified by the Board in accordance with the "attending circumstances". Our adversaries, however, have consistently brushed this case aside with the comment that it is only a primary jurisdiction case. Doubtless the import of this comment is that the language of this Court in *U. S. Navigation Co.* is mere dictum. This also is likely the implication in the remark of the court below (R. 244; 239 F. 2d at 938) that *U. S. Navigation Co.* and the other cases upon which we rely "do not decide the point."

It is a long-established principle that a bill or complaint in equity will not be dismissed if it states any claim upon which, on any theory, the relief sought may be granted. *Dioguardi* v. *Durning*, 139 F. 2d 774, 775 (2nd Cir. 1944); *Tauzin* v. *Saint Paul Mercury Indemnity Co.*, 195 F. 2d 223, 224 (5th Cir. 1952); *Clyde* v. *Broderick*, 144 F. 2d 348, 349 (10th Cir. 1944); *Johnson* v. *Fredrick*, 9 F. R. D. 616, 618 (D. Neb. 1949). Accordingly, even though the complaint stated no cause of action under the anti-trust laws, it would not have been dismissed if it did state a cause of action under the Shipping Act. The complaint would state a cause of action under the Shipping Act if a pure question of law were involved, *i. e.*, if the dual-rate system were illegal *per se*.

It is a well-established qualification to the primary administrative jurisdiction rule that where *a pure*

question of law is presented, with no area for the exercise of administrative judgment, the courts will not make the idle gesture of referring a case to an administrative agency when there can legally be only one outcome. *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291-292 (1922). This doctrine and the case in which it was so clearly stated take on critical significance to the proper interpretation of *U. S. Navigation Co.* when it is appreciated that this Court in that case thoroughly considered *Great Northern Railway Co.* (284 U. S. at 481-482):

> "* * * In *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291, the general rule and an exception to it are considered. The immediate question there at issue concerned merely the legal construction of an interstate tariff, *no question of fact, either as an aid to the construction, or in any other respect, and no question of administrative discretion, being involved.* It was held that the issue was within the jurisdiction of the courts without preliminary resort to the commission. But the distinction between that case and one where preliminary resort to the commission is necessary was definitely stated. Such resort, it was said, must be had where a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, and also where it is necessary, in the construction of a tariff, to determine upon evidence the peculiar meaning of words or the existence of incidents alleged to be attached by usage to the transaction. In all such cases the uniformity which it is the purpose of the Commerce Act to secure could not be obtained without a preliminary determination by the commission. *Preliminary resort to the commission is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that*

determination is reached ordinarily upon voluminous and conflicting evidence; for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts. But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute.'" (Italics supplied.)

In view of this reasoning in *U. S. Navigation Co.*, it would appear to be beyond dispute that this Court there weighed the question whether a *per se* statutory violation was involved. We urge that it is impossible to accept the view that *U. S. Navigation Co.* was entirely concerned with narrow technicalities of procedure. The jurisdictional point turned upon a far-reaching judicial doctrine which required that the case be retained in the courts if a pure question of law—a *per se* statutory violation—was involved; and reference in the first instance to the administrative agency definitely connoted that questions of fact and discretion were involved.

Twenty years after the decision in *U. S. Navigation Co.* this Court had before it the same basic question, varied only by the circumstance that the complaining party was the United States. *Far East Conference* v. *United States*, 342 U. S. 570 (1952), was a civil antitrust suit to enjoin a conference from continuing the use of its dual-rate system. The charge was violation of the Sherman Act,[15] and jurisdiction was invoked under § 4 of the Act.[16] The District

[15] 26 Stat. 209; 15 U. S. C. §§ 1 and 2.

[16] 26 Stat. 209; 15 U. S. C. § 4.

Court denied the defendants' motion to dismiss. 94 F. Supp. 900 (1951). On certiorari this Court reversed the judgment of the District Court, holding that the complaint stated a claim which was within the primary administrative jurisdiction of the Board and accordingly should be dismissed (342 U. S. at 576-577).

The decision in *Far East Conference* rested squarely on *U. S. Navigation Co.* (342 U. S. at 573):

> "* * * We see no reason to depart from *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U. S. 474. That case answers our problem. * * *"

In *Far East Conference* this Court quoted extensively from *U. S. Navigation Co.*, and after such quotation applied the very criterion for which we have above contended—that *U. S. Navigation Co.* disposed of the problem of the dual-rate system as one raising *issues of fact and of administrative discretion.* So the Court said (342 U. S. at 574-575):

> "The Court thus applied a principle, now firmly established, that *in cases raising issues of fact* not within the conventional experience of judges *or cases requiring the exercise of administrative discretion,* agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and *the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances*

underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." (Italics supplied.)

Thus the majority in *Far East Conference* treated the problem of the dual-rate system as one involving issues of fact and of administrative discretion. The validity of our contention is emphasized by the dissenting opinion, which viewed the case as involving purely a question of law, with the conclusion that the complaint should not be dismissed and that the case should be disposed of by the courts (342 U. S. at 578-579):

"Why should the Department of Justice be remitted to the Board for its remedy? The Board has no authority to enforce the Sherman Act. If the rates were filed, of course the Board would have exclusive jurisdiction to pass on them. But even then it is restricted. Section 14, Third, for example, makes unlawful retaliation against any shipper by resort to discriminatory or unfair tactics because a shipper has patronized another carrier. And it would seem plain that when a shipper is charged one rate if he gives the Conference a monopoly of his business and another and higher rate if the shipper uses a carrier not a member of the Conference, the shipper is being retaliated against for shopping around among carriers."

The disposition and reasoning of *U. S. Navigation Co.* and *Far East Conference* lead, we submit, to the conclusion that this Court held the system not to be illegal *per se*.

Swayne & Hoyt, Ltd. v. *United States*, 300 U. S. 297 (1937), arose on review of a decision of the Board

that the dual-rate system proposed by the Gulf Intercoastal Conference was unduly and unreasonably preferential and prejudicial in violation of § 16 of the Shipping Act (*Gulf Intercoastal Contract Rates*, 1 U. S. S. B. B. 524, 530 (1936)). Members of the conference brought a proceeding before a three-judge court in the District of Columbia to set aside the order of the Board. *Swayne & Hoyt, Ltd.* v. *United States*, 18 F. Supp. 25 (1936).

The District Court was "of the opinion that the admitted and undisputed facts bring the practice within the condemnation of the statute" (18 F. Supp. at 27). However, the court held the system illegal *per se*, not under § 14, Third, but under § 16.

This Court affirmed the decree of the District Court, but the opinion rested entirely upon the proposition that the question of validity of the dual-rate system was to be determined by the Board in accordance with the facts of the particular case and that its conclusions, if supported by evidence, would not be set aside.

The opinion quoted from § 16, First (46 U. S. C. § 815, First), and stated the issue as follows (300 U. S. at 303):

> "* * * The differential between appellants' rates on commodities transported under contract and the rates on the same commodities for non-contract shippers was prima facie discriminatory since the two rates were charged for identical services and facilities, and the narrow issue presented to the * * * [Board] for decision was whether, in the conditions affecting the traffic involved, the discrimination was undue or unreasonable."

The Court then defined the formula to be applied by the Board in determining the issue so described (300 U. S. at 304):

> "In determining whether the present discrimination was undue or unreasonable the * * * [Board] was called upon to ascertain whether its effect was to exclude other carriers from the traffic, and if so, whether, as appellants urge, it operated to secure stability of rates with consequent stability of service, and, so far as either effect was found to ensue, to weigh the disadvantages of the former against the advantages of the latter. * * *"

The opinion noted that there was evidence from which the Board could reasonably conclude that there was little need for a dual-rate system in the trade involved and that the system would tend to give the conference carriers a monopoly by excluding competition from new lines (*id.* at 305). The Court wrote as follows with respect to the effect to be given to the Board's conclusions (*id.* at 304):

> "Such determinations will not be set aside by courts if there is evidence to support them. Even though, upon a consideration of all the evidence, a court might reach a different conclusion, it is not authorized to substitute its own for the administrative judgment. See *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 481; *Pennsylvania Co.* v. *United States*, 236 U. S. 351; cf. *United States Navigation Co.* v. *Cunard S. S. Co.*, *supra*, 484. Whether a discrimination in rates or services of a carrier is undue or unreasonable has always been regarded as peculiarly a question committed to the judgment of the administrative body, based upon an appreciation of all the facts and circumstances affecting the traffic. * * *"

It seems clear that this Court rejected the theory of illegality *per se* which underlay the District Court decision and that, on the authority of *U. S. Navigation Co.*, it held that the legality of dual-rate systems involves a factual determination in each case and that the Board's conclusions in each case must stand "if there is evidence to support them." Further, the contention of our adversaries that *Swayne & Hoyt, Ltd.*, did not reject the argument of illegality *per se* would consign this Court's prescription of the criteria to be applied by the Board to the status of a purposeless exercise in rhetoric.

Finally and most important, this Court, in footnote 3 to *Swayne & Hoyt, Ltd.* (300 U. S. at 307), considered whether § 14 prohibits the dual-rate system. The footnote is appended to the following sentence in the text (*id.* at 306-7):

> "* * * As the * * * [Board] has interpreted the evidence, the operation of the contract system, *in the circumstances of this case*, does not differ substantially from that of 'deferred rebates' outlawed in both foreign and coastwise shipping by § 14 of the Shipping Act, 39 Stat. 733, 46 U. S. C. § 812." (Italics supplied.)

It should be noted that the foregoing passage should not, as our adversaries have suggested, be read as indicating that dual-rate systems are, *under all circumstances*, indistinguishable from deferred rebate systems. The Court limited its finding relative to such similarity to circumstances existing under the evidence as it had been interpreted by the Board. The dual-rate system had been proposed by an intercoastal conference which was subject to the Intercoastal Shipping Act, 1933 (47 Stat. 1425; 46 U. S. C. §§ 843-848).

The Board had considered its powers over rates charged in intercoastal commerce—powers which it lacks with respect to individual carriers in foreign commerce under the Shipping Act—sufficient to enable it to enforce stability of rates on its own initiative in commerce between the coasts. Since the dual-rate system was therefore unnecessary to secure stability, its only purpose in the intercoastal trade was that of monopolizing the traffic for the combined lines.

Since the Board dealt with the foregoing factual situation under § 16 (46 U. S. C. § 815), and nowhere drew any analogy between the deferred rebate system and the dual-rate system, the above quoted passage is this Court's view that the Board's conclusion as to the effect of the dual-rate system *in the circumstances of that particular case only* did not differ substantially from the effect of prohibited deferred rebates. That the opinion cannot properly be read as making this observation applicable to all dual-rate systems appears from the footnote above referred to which, after quoting the § 14 definition of a deferred rebate, proceeds (300 U. S. at 307):

> "The report of the House Committee on Merchant Marine & Fisheries, H. R. Doc. 805, 63rd Cong., 2d Sess. (1914), recommended (p. 307) the prohibition of deferred rebates, adopted in § 14 of the Shipping Act, because it operated to tie shippers to a group of lines for successive periods, and because the system 'is unnecessary to secure excellence and regularity of service, a considerable number of conferences being operated today without this feature.' See, e. g., pp. 103-105, 200. The Committee recognized that the exclusive contract system does not necessarily tie up the shipper as completely as 'deferred rebates,' since it does not place him in 'continual

dependence' on the carrier by forcing his exclusive patronage for one contract period under threats of forfeit of differentials accumulated during a previous contract period. Accordingly the Committee did not condemn the contract system completely. Cf. W. T. Rawleigh Co. v. Stoomvaart, 1 U. S. S. B. 285. The policy of the statute may properly be applied where, as in the circumstances of this case, the contract system must be taken as actually operating to effect a monopoly. Cf. Eden Mining Co. v. Bluefields Fruit & S. S. Co., 1 U. S. S. B. 41."

We urge that this footnote constitutes a holding that dual-rate systems are not illegal *per se* under § 14, Third. Under any other view this Court could not have concluded that the Board had discretion under § 16 of the Act to hold systems legal or illegal, depending upon the conclusion drawn from the application of the prescribed criteria. This holding was based on an analysis of § 14, such as we have urged under our First Point, together with a consideration of the legislative history, which we will treat in our Fourth Point. The conclusion was that whereas deferred rebates were flatly prohibited, the legality of dual-rate systems was by statute left to be determined by the administrative agency upon a consideration of their economic impact upon transportation and trade in particular instances.

The concurring opinion below suggests two answers to our contention respecting footnote 3 to *Swayne & Hoyt, Ltd.* (R. 246, n. 7; 239 F. 2d 939-940, n. 2). The first answer implies that this Court mistook a recital by the Alexander Committee of a contention made to it for a finding made by it.

We submit that no mistake was involved. It is true that under the caption, "Disadvantages of Shipping Conferences and Agreements, as Now Conducted," the Committee stated (H. R. Doc. 805, 63rd Cong., 2d Sess. (1914) 307) that the deferred rebate should be prohibited, and stated its first reason as follows:

> "(1) By deferring the payment of the rebate until three or six months following the period to which the rebate applies ship owners effectively tie the merchants to a group of lines for successive periods. *In this connection it is argued that the ordinary contract system does not place the shipper in the position of continual dependence that results from the deferred rebate system.*" (Italics supplied.)

Under a previous caption (*id.* at 295 *et seq.*), the Committee enumerated advantages of shipping conferences.

That these discussions of advantages and disadvantages were findings and not mere recitals of contentions is indicated by the "Recommendations of the Committee." There (*id.* at 416) the Committee stated:

> "* * * (A classification of the advantages claimed as resulting from the aforementioned factors is presented on pp. 295 to 303 of the foregoing report.)
>
> "These advantages, the Committee believes, can be secured only by permitting the several lines in any given trade to cooperate through some form of rate and pooling arrangement under Government supervision and control. * * *"

And (*id.* at 418) the Committee stated:

> "The Committee believes that the disadvantages and abuses connected with steamship agreements

and conferences as now conducted are inherent, and can only be eliminated by effective government control; and it is such control that the Committee *recommends as the means of preserving to American exporters and importers the advantages enumerated, and of preventing the abuses complained of.*" (Italics supplied.)

It thus appears that the Committee found that the disadvantages, abuses and advantages which were recorded in its report, actually existed and that what was stated in one place as a contention, was later acted upon as a fact.

The second answer, suggested by the concurring judge below, to our argument regarding the significance of *Swayne & Hoyt, Ltd.*, is based upon the discovery of an asserted distinction between the shipper's contract form here involved and the contract before the Court in *Swayne & Hoyt, Ltd.* Indeed, this was stated to be the more significant answer.

In *Swayne & Hoyt, Ltd.*, this Court mentioned, and apparently considered relevant, only the two features which all exclusive patronage dual-rate systems have in common, *i. e.*, the dual level of rates, and shippers' contracts which accord only to signatories the lower of these levels (300 U. S. at 299). In those two particulars there is no distinction between the *Swayne & Hoyt, Ltd.*, contract form and the JAGFC form.

The *Swayne & Hoyt, Ltd.*, contract form may be found at 1 U. S. S. B. B. 525-526. The concurring opinion would distinguish between the *Swayne & Hoyt, Ltd.*, form and the JAGFC form on the ground that the rates in the former were not subject to change. Articles 3 and 5 of the actual *Swayne &*

Hoyt, Ltd., form show that the rates were subject to change by amendment or reissue of the tariff and that in applying the rates, the date of sailing was to govern. No notice of increase was required, the only limitation being the 30 day filing and posting period required by § 2 of the Intercoastal Shipping Act, 1933 (46 U. S. C. § 844). Further, the Board's Report (*id.* at 524-525) shows that the conference tariffs were to be effective only from October 3, 1935, to December 31, 1935. Certainly there can be no distinction in principle between that period of less than three months and the period of from two to three months which is the minimum time during which rates cannot be changed under the JAGFC form.

Next, the concurring opinion would distinguish between these two forms of contract on the ground that the carrier's obligation to transport was firmer under the *Swayne & Hoyt, Ltd.*, form. This contention is without substance. Article 3 of the *Swayne & Hoyt, Ltd.*, form contains the following proviso:

> "Provided space is available when application is made therefor."

Finally, the concurring opinion distinguished the two forms on the basis of liquidated damages provisions; but Article 4 of the *Swayne & Hoyt, Ltd.*, form provided that the liquidated damages would be additional freight "on all commodities theretofore shipped with such CARRIERS since the execution of this agreement, in the amount of the difference between the tariff contract rate or rates and the tariff non-contract rate or rates of the transporting carriers in force on such commodities at the time of such shipment." Thereby liquidated damages would depend on how

much cargo the violating shipper had previously consigned on conference vessels. The substantial shipper who makes a small shipment on an outside line would obviously bear a disproportionately high burden of liquidated damages. This type of clause has long since been condemned by the Board. *Pacific Coast European Conference Agreement*, 3 U. S. M. C. 11, 18-19 (1948).

We submit that the authority of *Swayne & Hoyt, Ltd.*, against illegality *per se* of the dual-rate system has been in no way impeached.

In the present case the Board analyzed the economic factors and conscientiously applied the yardstick prescribed in *Swayne & Hoyt, Ltd.*, by which dual-rate systems should be evaluated. Notwithstanding *U. S. Navigation* and *Swayne & Hoyt, Ltd.*, the court below gave little weight to the economic factors found by the Board and, although it recited the holding in *Swayne & Hoyt, Ltd.*, that a dual-rate system involves a *prima facie* discrimination, proceeded to a conclusion which deprived the *prima facie* character of the discrimination of all legal significance. It held that under no circumstances may the discrimination be justified.

We submit that the decision of the Court of Appeals is irreconcilable with *U. S. Navigation Co.*; which was reviewed and reaffirmed in *Far East Conference* in 1952, and with *Swayne & Hoyt, Ltd.*, cases which have served the Board and the industry as the key to the legal aspects of dual-rate systems for more than 20 years.

THIRD POINT

The Board has consistently interpreted the Shipping Act as not prohibiting dual-rate systems *per se*; and this consistent administrative interpretation is entitled to weight.

If we should be utterly wrong in our conviction that *U. S. Navigation Co., Far East Conference,* and *Swayne & Hoyt, Ltd.,* decide in our favor the issue of illegality *per se,* certainly they demonstrate that the statute does not clearly and without ambiguity demand the interpretation given to it by the court below. *Isbrandtsen Co.* v. *United States,* 81 F. Supp. 544, 546 (S. D. N. Y., 1948), appeal dismissed *sub nom. A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Co.,* 336 U. S. 941 (1949). Such doubt, betokening ambiguity, would justify a study of the consistent administrative interpretation of the statute and an analysis of the legislative history. Such study and analysis support our position.

It is doubtless true that prior to *Swayne & Hoyt, Ltd.,* the Board's decisions evidence an evolutionary process of formulating the factual standards to be determinative in each dual-rate case. Nonetheless, the Board's review of its decisions as set forth in its Report herein (R. 38-50) demonstrates that it has consistently held for more than 35 years that the dual-rate system is not illegal *per se.* However, those who assert illegality *per se* have introduced confusion on the point to such degree that, in an opinion in which the issue of illegality *per se* was not decided, a three-judge district court declared

passim, that the Board decisions have lacked uniformity and consistency (*Isbrandtsen Co.* v. *United States*, 96 F. Supp. 883, 890-891 (1951), aff'd by an equally divided court *sub nom.*, *A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Co., Inc.*, 342 U. S. 950 (1952)).

The Board has always recognized that a prerequisite to proper conduct of our foreign trade is stability of ocean freight rates. Accordingly, it has condemned competition by rate cutting, whether by an individual line or a conference. Because rate cutting by an established differential is particularly destructive of rate stability, that type of rate cutting has been most severely condemned. *Section 19 Investigation, 1935*, 1 U. S. S. B. B. 470 (1935); *Rates, Charges and Practices of Yamashita and O. S. K.*, 2 U. S. M. C. 14 (1939); *Cargo to Adriatic, Black Sea, and Levant Ports*, 2 U. S. M. C. 342 (1940). The Board can stop rate cutting by conferences through its power to cancel the conference agreement if it operates to the detriment of our commerce (§ 15). Since the Board has no power over the individual rate cutter, conferences have traditionally resorted to the protective device of the dual-rate system.

The first administrative determination regarding the dual-rate system was *Eden Mining Co.* v. *Bluefields Fruit & Steamship Co.*, 1 U. S. S. B. 41 (1922). There the Board held that a dual-rate system practiced by a single carrier, "under the circumstances involved in this case," constituted an undue and unreasonable prejudice and disadvantage to, and an unjust discrimination against, complaining non-contract shippers, in violation of §§ 16 and 17 of the

Shipping Act (1 U. S. S. B. at 48). In this earliest case, however, the Board held that the dual-rate system there in evidence did not constitute retaliation and did not violate § 14, Third (*id.* at 46):

> "No evidence was adduced relating to any action of the respondent tending to show direct or indirect retaliation against the complainants for patronizing other carriers. Likewise, from the facts of record it is clear that the contracts for exclusive patronage complained of were not to any extent based upon volume of freight offered. That part of the complaint alleging violations by the carrier of paragraphs 3 and 4 of section 14 of the act is, therefore, without support."

This is a clear holding that a dual-rate system does not, without other evidence, constitute direct or indirect retaliation or violate § 14, Third—*i. e.*, such system is not illegal *per se*.

The Board next considered a dual-rate system in *Rawleigh* v. *Stoomvaart*, 1 U. S. S. B. 285 (1933). There a non-contract shipper filed a complaint alleging violation by the respondent conference of § 14, Third and Fourth; § 16, First and Second; and § 17 of the Shipping Act. The complaint specifically charged that the conference "resorted to discriminatory or unfair methods against complainant because complainant refused to agree to patronize respondent common carriers exclusively, 'or for any other reason' in violation of section 14 (third) of the Shipping Act, 1916" (1 U. S. S. B. at 286-287). The Board's report specifically stated that the complainant confined the issue to illegality *per se* (*id.* at 288).

The Board rejected complainant's contention (1 U. S. S. B. at 293):

> "The Shipping Act, which closely parallels the recommendations of the foregoing legislative committee [H. R. Doc. 805, 63d Cong., 2d Sess. 415-424 (1914)], does not forbid the contract rate practice as such; nor has the Board ever considered that the practice as a practice contravenes any of the regulatory provisions of the shipping statute. Similarly as in connection with other accepted modes of rate making, through it violation of the regulatory statute may be effected, as for example, in the Eden case, or where, as recognized by respondents upon brief, the spread between the contract and non-contract rates is such in amount as to constitute unlawfulness. This present proceeding, however, involves no issue respecting anything other than the lawfulness of the contract rate practice per se, and upon the record we have no hesitation in determining that, as urged by the respondents, their practice under attack has not upon such record been shown to be other than fairly justified by embrasive considerations of volume, regularity and flow of cargo. * * *"

In *Intercoastal Investigation, 1935*, 1 U. S. S. B. B. 400, 463 (1935), the Board held that a dual-rate system in intercoastal commerce, as practiced by the Gulf Intercoastal Conference and by two other carriers in that trade, violated §§ 16 and 18 of the Shipping Act, and distinguished *Rawleigh*, which involved foreign commerce (*id.* at 467). Once again the issue was resolved on the record in the particular case.

After the Board's decision in *Intercoastal Investigation, supra*, the Gulf Intercoastal Conference filed new dual-rate tariffs. Thereupon the Board instituted a proceeding reported as *Gulf Intercoastal Contract Rates*, 1 U. S. S. B. B. 524 (1936), the

order in which was reviewed in *Swayne & Hoyt, Ltd.* The Board found that the powers conferred upon it by the Intercoastal Shipping Act, 1933, 47 Stat. 1425, 46 U. S. C. § 843, *et seq.*, enabled it to stabilize rates and that this circumstance distinguished the case from *Rawleigh*. The Board concluded that the system was not justified by transportation conditions in the trade involved and was unduly and unreasonably preferential and prejudicial in violation of § 16 of the Shipping Act. 1 U. S. S. B. B. at 530. As a caveat to its comments regarding the lawfulness of the dual-rate system in foreign commerce, the Board remarked (*ibid.*):

> "It should be understood that the * * * [Board] is not here sanctioning all contract rate systems in foreign commerce. Whether any such system is lawful is a question which must be determined by the facts in each case."

Contract Routing Restrictions, 2 U. S. M. C. 220 (1939), was an investigation by the Board of the dual-rate systems of several Trans-Atlantic Conferences. The Board, though requiring modification of certain provisions of the form of shippers' contract, again held the system not to be illegal *per se* (2 U. S. M. C. at 225).

In *Pacific Coast European Conference*, 3 U. S. M. C. 11, 12 (1948), the Board, while again requiring a modification of the contract form, rejected the contentions of the Departments of Justice and Agriculture, which had intervened in the proceeding, that the system was illegal *per se* (3 U. S. M. C. at 16).

The more recent Board cases are in accord: *Isbrandtsen Co.* v. *N. Atlantic Continental Frt. Conf.*,

3 F. M. B. 235, 239-244 (1950), order set aside on other grounds *Isbrandtsen Co. v. United States*, 96 F. Supp. 883 (S. D. N. Y. 1951), aff'd. by an equally divided court sub nom. *A/S J. Ludwig Mowinckels Rederi v. Isbrandtsen Co., Inc.*, 342 U. S. 950 (1952); *In the Matter of the Statement of Trans-Pacific Freight Conference of Japan, filed under General Order 76* (F. M. B. Docket No. 743, slip opinion dated December 19, 1955); *Secretary of Agriculture of the United States v. North Atlantic Continental Freight Conference* (F. M. B. Dockets Nos. 725 and 751, slip opinion dated February 29, 1956).

Without exception the Board has interpreted the Shipping Act as not rendering dual-rate systems illegal per se.

Yet in 1956, thirty-four years after the Board's first decision on the point, the Court of Appeals, without mentioning the Board's decisions, found itself compelled to give the statute a meaning diametrically opposed to the Board's consistent interpretation, which has been based upon statutory language, legislative history, the supposed meaning of decisions of this Court, and considerations of regulatory policy. In discarding all of the policy considerations which have guided the Board's administration of the Act, the judgment below appears to have ignored the admonition of this Court in *United States v. Morgan*, 307 U. S. 183, 191 (1939), as applied and quoted in *Far East Conference*, 342 U. S. at 575:

> "'. . . court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without

> regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coördinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim.' * * *"

In the light of this delineation of the relationship between the judicial and the quasi-judicial administrative functions, and taking into account the emphasis on the limited nature of the function of judicial review in cases such as this (*Far East Conference*, 342 U. S. at 574-575; *Swayne & Hoyt, Ltd.*, 300 U. S. at 304, 306-307; *U. S. Navigation Co.*, 284 U. S. at 486-487), the decision below would appear to have disregarded completely the place of the administrative function in the interpretation of regulatory statutes. *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 130-131 (1944). It certainly cannot be reconciled with the principle that weight is to be given to consistent administrative interpretation. In *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 472-473 (1915), this Court explained the rule and disposed of criticism of it as follows:

> "2. It may be argued that while these facts and rulings prove a usage they do not establish its validity. But government is a practical affair intended for practical men. Both officers, law-

> makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation."

Hundreds of millions of dollars have been invested by our government and by private parties in the building, for operation in the various United States foreign trades, of ships which incorporate the most advanced design. These moneys were invested on the theory that freight rates in United States foreign commerce could be stabilized by the dual-rate system, the only practicable defense, always regarded as lawful, against the kind of competition which would destroy such investments. If the consistent interpretation above outlined should now be abandoned, then rate competition will take the place of competition in quality of service; and the cheapest ship, entailing the lowest depreciation and the lowest insurance coverage, will be the most effective in the struggle for survival.

FOURTH POINT

The legislative history of the Shipping Act supports our interpretation.

The primary source of information as to the purposes of Congress in adopting the Shipping Act, is the Alexander Committee Report, H. R. Doc. 805, 63rd Cong., 2d Sess. (1914). It has been so regarded by this Court (*Swayne & Hoyt, Ltd.*, 300 U. S. at 307) and by the Board (R. 50-51).[17]

The significance of the Alexander Committee Report can only be fully appreciated in the light of the legislative climate which prevailed when the investigation was authorized. As early as April 4, 1911, a bill was introduced in the House of Representatives by Mr. Humphrey, who later served on the Alexander Committee, by the terms of which any foreign flag vessel owned by a person adjudged to be a party to a combination or conspiracy in violation of the Sherman Act, would be prohibited from serving United States ports under a penalty of $25,000; and the Post-

[17] Isbrandtsen has suggested that because the Alexander Report was submitted in 1914 and the Shipping Act was enacted in 1916, the lapse of time and the numerous Bills introduced in the interim deprive the Report of authority as legislative history. This position is not tenable. H. R. 15455, 64th Cong., 1st Sess. (1916), which became the Shipping Act, 1916, was accompanied by H. R. Report No. 659. This Report quoted verbatim the recommendations in the Alexander Committee Report and stated (p. 27) that the Alexander Committee recommendations had in large part been followed in framing §§ 15 to 21 (now §§ 14 to 20). We also refer to the debates on H. R. 15455, where H. R. Report No. 659, including the quotation of the Alexander Committee recommendations, was set forth. 53 Cong. Rec. 13429-13430 (Aug. 30, 1916).

master General would be directed to cancel ocean mail contracts with a party to such a conspiracy (H. R. 1290, 62d Cong., 1st Sess.).

On April 13, 1911, H. R. 4660, 62d Cong., 1st Sess., was introduced. This bill shows that when legislators sought to outlaw exclusive patronage contracts, they knew how to use express language to accomplish their purpose. Thus, § 23 of that bill provided, so far as here material:

> "That the making or offering to make a contract for the exclusive carriage of goods, wares, or merchandise, either to or from foreign countries; conditioned partly on the shipment of such goods in the future by no other vessel or line of vessels, or promising to make or making of payment of rebates of freightage thereon, in consideration of making such contract, by an owner or agent of any vessel or line of vessels, is hereby declared a misdemeanor, punishable by fine in a district court of the United States of not less than three thousand dollars or more than ten thousand dollars on each conviction of such owner or agent of any such offending vessel or line of vessels, and if under foreign registry, after the conviction of owner or agent as above, such vessel or line of vessels shall not thereafter be permitted either to land or to load cargo in the United States. [There followed further penal provisions.] * * *"

This bill struck at all rebates in consideration of exclusive patronage, and not only the deferred rebates condemned by the Shipping Act.

Mr. Humphrey introduced H. R. 23470 in the 62d Cong., 2d Sess., on April 17, 1912. This bill extended the proposed prohibitions in H. R. 1290, which he had introduced in the first session, to United States flag vessels.

Such was the trend of Congressional thought when the resolutions authorizing the Alexander Committee Investigation were introduced in the House (H. Res. 425, 62d Cong., 2d Sess. (February 24, 1912); H. Res. 587, 62d Cong., 2d Sess. (June 18, 1912)). Both resolutions (printed in H. R. Doc. 805, 63d Cong., 2d Sess. 8-9 (1914)) directed investigation of the combined activities of common carriers by water "for the purpose of fixing rates and tariffs, or of giving and receiving rebates, special rates, or other special privileges or advantages, or for the purpose of pooling or dividing their earnings, losses, or traffic, or for the purpose of preventing or destroying competition" (H. Res. 587, *supra*). The Committee was directed to investigate whether the agreements and practices of the carriers were in violation of the laws of the United States, and to report what legislation, if any, it should deem advisable in relation thereto.

The Committee had the cooperation of the Department of Justice, which placed before it the records in a considerable number of pending antitrust suits against conferences (*id.* at 4),[18] in which the conferences had raised the contention that the facts peculiar to shipping made the antitrust laws inapplicable. Due to the outbreak of World War I, the cases became moot, and the point could not be decided by this Court.

The hostility to conferences which prevailed at the outset of the investigation disappeared when the Com-

[18] *United States* v. *Hamburgh-American S. S. Line*, 216 Fed. 971 (S. D. N. Y. 1914); rev'd as moot, 239 U. S. 466 (1915); *United States* v. *Prince Line*, 220 Fed. 230 (S. D. N. Y. 1915), rev'd as moot, 242 U. S. 537 (1917); and *United States* v. *American-Asiatic S. S. Co.*, 220 Fed. 230 (S. D. N. Y. 1915), rev'd as moot, 242 U. S. 537 (1917).

mittee learned of the advantages to all commercial interests of combined steamship activities; and in the end, the very core of the Committee's recommendations was that conferences should be permitted to operate under agreements filed with and approved by a government agency and operating under agency regulation.

After describing and analyzing the agreements and competitive practices found to exist in the various foreign trades of the United States, the Committee's Report enumerated the advantages and disadvantages to shippers and carriers of conferences and their practices (H. R. Doc. 805, 63d Cong., 2d Sess. (1914) 281-314). The Report set forth various methods used by conferences to control competition among the member lines, and also described the methods of "meeting the competition of lines outside of the Conference" (*id.* at 287).

The first method set forth was the deferred rebate system. The essential features of such systems were described in terms foreshadowing the language of § 14, First (*id.* at 287). However, the following feature of the deferred rebate system, as practiced in some trades, requires special note. The Committee said (*id.* at 288):

> "* * *. Moreover, as has been repeatedly pointed out in this volume, shippers require, above all else, a regular service, and in this connection the testimony shows that by patronizing an outside line the shipper would not only forfeit his rebates *but could be penalized by being denied accommodations for future shipments even at the full rates of freight. Such retaliation would leave the shipper unprotected* since an independent line

is not large enough to supply him with tonnage at all times. * * *". (Italics supplied.)

Here the concept of retaliation is introduced. There is no reference to this concept in § 14, First, of the Shipping Act, but it does appear in § 14, Third. The retaliation adverted to by the Committee was denial of accommodations *even at the full rate of freight,* because a shipper had patronized a line not a party to the deferred rebate system.

The fighting ship practice was described by the Committee in terms of obvious disapproval (*id.* at 289-290).

The Report discussed the various types of contracts with shippers used by conference lines to meet outside competition (*id.* at 290-292). We quote the Committee's description of the first category of contracts because it appears so clearly to demonstrate that the Committee very well knew of the existence of dual-rate systems (*id.* at 290):

> "*(a) Joint contracts made by the conference as a whole.*—Such contracts are made for the account of all the lines in the agreement, each carrying its proportion of the contract freight as tendered from time to time. The contracting lines agree to furnish steamers at regular intervals and the shipper agrees to confine all shipments to conference steamers, and to announce the quantity of cargo to be shipped in ample time to allow for the proper supply of tonnage. The rates on such contracts are less than those specified in the regular tariff, but the lines generally pursue a policy of giving the small shipper the same contract rates as the large shippers, i. e. are willing

at all times to contract with all shippers on the same terms."

Here are briefly described the essential features of a dual-rate system. The contracts were not contracts for the carriage of specific shipments. Each line was to carry "its proportion of the contract freight as tendered from time to time". There was no ironclad undertaking of the conference lines to carry each shipment as tendered. Rather did they "agree to furnish steamers at regular intervals". There definitely were dual-rates, since "The rates on such contracts are less than those specified in the regular tariff," and all shippers were afforded the opportunity to contract on the same terms.

Significant is the absence of any reference to "retaliation" in the description of these dual-rate systems, such as appeared with reference to the denial of space accommodations earlier in the report. There also is no reference to guaranteed price, definite period, bona fide requirements, or any other characteristics which the concurring opinion below found to be distinguishing features of the contracts before the Alexander Committee (R. 247; 239 F. 2d at 940). The contracts to which the Court of Appeals referred were probably those described by the Alexander Committee under caption (*b*), *i. e.*, "Contracts made by the individual members of the conference * * *". That such contracts were in evidence before the Committee in no way detracts from its finding of the existence of dual-rate contracts similar in their essential features to those involved in this case. Certainly the Alexander Committee believed that it had studied contracts which are indistinguishable from the proposed

JAGFC form, and the legislation which it recommended was conceived in that belief.[19]

In the light of the foregoing, it should, we believe, suffice to cite one dual-rate system which was in evidence before the Alexander Committee. To do so requires reference not only to the document introduced, but also to the testimony of the shipping man through whom it was introduced. Mr. Alexander inquired of Mr. Paul F. Gerhard, General Agent for the Prince Line, regarding contracts with shippers in the various trades in which the Prince Line was a conference member. Mr. Gerhard, after stating that in the River Plate trade the larger shippers were the first to contract, testified (*Proceedings of the Committee on the Merchant Marine and Fisheries*, 62nd Cong., 2nd Sess., Vol. 1 (1913) p. 246):

> "Mr. Gerhard. * * * When we finally close a contract with one of these houses, which generally is for agricultural machinery, *at lower rates than our tariff rates*, being such large quantities, you know, why, the other houses fall in

[19] In 1918, but two years after the enactment of the Shipping Act, Professor Emory R. Johnson of the University of Pennsylvania, one of the economic experts of the Alexander Committee, collaborated with Professor Grover Huebner, also of Pennsylvania, in publishing "Principles of Ocean Transportation". At pp. 288, 289, they described the deferred rebate and the fighting ship and observed that both had been outlawed by the Shipping Act. They next described the dual-rate system in terms generally similar to those in the Alexander Report and remarked that contracts were usually open to all shippers alike, but that the system "has at times been a source of discrimination". With regard to the effect of the Shipping Act on the dual-rate system, their language was: "The Shipping Act, however, prohibits unfair discriminations in the future". Since private commercial ship operations practically ceased during the war years 1914-1918, the foregoing constitutes contemporaneous evidence that the dual-rate system was well known at the time of the Alexander investigation and that there was no intention to outlaw it *per se*.

line and close contracts on the same terms. After these big shippers have those lower rates we feel it is but right and proper that the small shippers should have the same rates, and for that reason we then offer those smaller shippers contracts on identically the same terms, so as to give them all a chance to work on the same basis. * * *" (Italics supplied.)

So that there may be no doubt that different rates would be charged shippers who did and shippers who did not enter into contracts, we quote the colloquy between Mr. Gerhard and Rep. Stephens (*id.* at 264):

"Mr. Stephens. 'If the smaller shipper refused to make a contract, or does not make a contract with you when the terms are offered him, can he get the same rates, or what rate does he get?

Mr. Gerhard. He gets the tariff rate.

Mr. Stephens. He can not obtain the smaller rate?

Mr. Gerhard. He can get it on the same terms as the other people are getting it. * * *"

Numerous contracts entered into pursuant to the described arrangement were received by the Committee as exhibits (*id.* at 246-263). None of these contracts was referred to in the footnote to the concurring opinion below. Reference to one of these contracts (*id.* at 248) suffices to show that its terms do not support a distinction in principle from the contract form proposed by JAGFC. The January 21, 1910, contract entered into by the Prince Line on behalf of the conference lines with Guinle & Co., requires exclusive patronage by the shipper with respect to all merchandise dispatched by it from New York to Brazil. The carriers' undertaking was "to provide space *on receipt of ample notice of your requirements.*"

The contract was to be effective for 3 months following the month of execution and to continue in force thereafter subject to 30 days notice of withdrawal. It may be noted that in other contracts set forth on succeeding pages of the *Proceedings* there is a provision that in the event of reduction in the rates to any other shipper, the contract shipper is to have the benefit of such reduction.

Thus there was no absolute undertaking to supply the shipper's requirements for space regardless of other commitments, and that the conference lines had no "hedge" against reductions in rates, as suggested by the concurring opinion below. Similarly, the shipper was not insured against rate increases except for the initial 3 month period of the contract, since thereafter the conference would be free to cancel on 30 days' notice if it desired to increase the rates. It thus appears that the concurring opinion erred in its view that the omission of Congress specifically to condemn the dual-rate system is without significance because Congress did not, when adopting the Shipping Act, know that dual-rate systems existed (R. 247-248; 239 F. 2d at 940). The legislative history proves that Congress had full knowledge of existing dual-rate systems.

And it cannot be overemphasized that even if the contracts today were of the same kind as the concurring opinion believed they were in 1913, nonetheless both opinions would have struck down such contracts inasmuch as they would involve discrimination and, in the eyes of the court, retaliation; for the non-contract shipper in 1913 paid the higher rate (discrimination) for the reason that he did not contract (retaliation).

We believe that we are fully justified in asserting that the omission of Congress to outlaw dual-rate systems *in haec verba* cannot be ascribed to a lack of knowledge of their existence, and must be explained by a deliberate intention not to outlaw such systems, but rather to subject them to administrative regulation within the framework of the statute.

The Committee set forth (H. R. Doc. 805, 63d Cong., 2d Sess. (1914) 295-303) the advantages secured through agreements and cooperative understandings "as presented to the Committee". For brevity's sake we quote only the main captions in this portion of the report.

"*I. Improvement in service:*"

"*1. Regularity of service, resulting in the following advantages:*" [*Itemizing 7 advantages.*]

"*2. Greater security is given to capital invested in the steamship business*"

"*II. Stability of rates over long periods of time*"

"*III. Uniform freight rates secured to all merchants.*"

"*IV. Prevent the elimination of weaker lines in the various trades.*"

"*V. Maintenance of rates from the United States to foreign markets on a parity with those from other countries*"

"*VI. Reduction in the cost of service, eventually resulting in lower freight rates for a high standard of service.*"

"*VII. Cost of service can be more economically distributed over the traffic so as to develop the trade.*"

Following the advantages, the Committee enumerated the disadvantages of shipping conferences and agreements as then conducted (*id.* at 304-307). In the course of this discussion, the Committee stated (*id.* at 306):

> "4. Conference lines, through their monopolistic powers, so completely dominate the shippers with whom they deal that these shippers can not afford, *for fear of retaliation,* to place themselves in a position of active antagonism to the lines by openly giving particulars of their grievances. This condition is well illustrated by the frequency with which communications, addressed to the Committee, referred to the confidential nature of the information furnished. * * *" (Italics supplied.)

This new reference to retaliation contains no indication whatsoever of the means of retaliation before the Committee. Doubtless this is explained by the second sentence, which indicates that the "fear" was deduced by the Committee from the request of shippers for confidential treatment of their replies to inquiries, and had no substantial foundation in any instance of a particular retaliatory act. Doubtless, this experience led the Committee to recommend the prohibition of retaliation because a shipper "has filed a complaint charging unfair treatment" (p. 90, *infra*) and caused Congress to include the same language in § 14, Third.

The true nature of the retaliation of which the Committee had actual evidence is indicated at pp. 164-5 of the Report. After setting forth the deferred rebate system in use in the homeward trade from Brazil, the Committee described the difficulties thereby created for non-conference services in part as follows:

> "* * * Not only did the shippers wish not to

> lose the rebates that had accumulated, by patronizing the Pan American Mail Line * * *, but they were possessed with the fear that if they used the Pan American Mail Line's steamers the syndicate lines would, on one pretext or another, *retaliate by refusing them accommodations* on their subsequent shipments both in the American and European trade. (Vol. 1, p. 87.)" (Italics supplied.)

Again, at p. 165, the Report states:

> "* * * Moreover, the representatives of the Pan American Mail Line charged that the opposition lines not only threatened shippers with the loss of their rebates in both the American and European trades, but let it be known that they would *refuse to accept any longer the cargoes of disloyal shippers* and would also start an opposition service with a view to running the American line out of the trade. (Vol. 1, p. 19.)" (Italics supplied.)

We also refer to pp. 166-167 of the Report.

We submit that the proof is overwhelming that the concept of retaliation, founded on the evidence before the Alexander Committee and expounded in its Report, relates to refusal to extend to a shipper the physical services of a common carrier because he has done one of a number of things considered inimical to the carrier's interest. Nowhere is there the slightest intimation that the concept of retaliation applied to rates or exclusive patronage contracts.

The mass of evidence from all segments of our economy concerned with foreign commerce persuaded the Committee that the abolition of combined carrier

action would be injurious to our economy and that the only logical course should be regulated carrier combinations. The Committee concluded that conferences should not be prohibited but authorized and regulated so as to retain their advantages and at the same time prevent their abuses (*id.* at 416-417):

> "* * * It is claimed that the adoption of the first course—the prohibition of cooperative arrangements between practically all the lines in nearly all the divisions of our foreign trade—would not only involve a wholesale disturbance of existing conditions in the shipping business but would deprive American exporters and importers of the advantages claimed as resulting from agreements and conferences if honestly and fairly conducted, such as greater regularity and frequency of service, stability and uniformity of rates, economy in the cost of service, better distribution of sailings, maintenance of American and European rates to foreign markets on a parity, and equal treatment of shippers through the elimination of secret arrangements and underhanded methods of discrimination. (A classification of the *advantages claimed* as resulting from the aforementioned factors is presented on pp. 295 to 303 of the foregoing report.)
>
> "*These advantages, the Committee believes, can be secured* only by permitting the several lines in any given trade to cooperate through some form of rate and pooling arrangement under Government supervision and control. *It is the view of the Committee that open competition can not be assured for any length of time by ordering existing agreements terminated. The entire history of steamship agreements shows that in ocean commerce there is no happy medium between war and peace when several lines engage in the same trade.* Most of the numerous agreements and conference

arrangements discussed in the foregoing report were the outcome of rate wars, and represent a truce between the contending lines. *To terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership.* Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement. *Moreover, steamship agreements and conferences are not confined to the lines engaging in the foreign trade of the United States.* They are as universally used in the foreign trade of other countries as in our own. *The merchants of these countries now enjoy the foregoing advantages of cooperative arrangements, and to restore open and cutthroat competition among the lines serving the United States would place American exporters at a disadvantage in many markets as compared with their foreign competitors.*" (Italics supplied.)

So the Committee commended rate stability as a prerequisite to the prosperity of our international trade, and advocated the conference as the instrumentality for ensuring stability. So, conversely, the Committee condemned rate-cutting competition and the inevitable rate wars as detrimental to our commerce. It is unthinkable that the Committee, animated by such conceptions, or that Congress, acting upon its recommendations, could have entertained the purpose, in the use of the most inapt language of § 14, Third, to condemn *per se* by implication the one remaining means which would enable conferences to exist and to accomplish their stabilizating function.

In summarizing the complaints against conference activity, the Committee said (*id.* at 417):

> "* * * A considerable number of complaints were also filed with the Committee objecting to excessive rates, discrimination between shippers in rates and cargo space, indifference to the landing of freight in proper condition, arbitrariness in the settlement of just claims, failure to give due notice to shippers when rates were to be increased, refusal to properly adjust rates as between various classes of commodities, and *the unfairness of certain methods—such as fighting ships, deferred rebates, and threats to refuse shipping accommodations—used by some conference lines to meet the competition of nonconference lines.* * * *" (Italics supplied.)

This enumeration is most pertinent to the solution of the question of interpretation involved in this case. The methods of meeting outside competition complained of as unfair, included "threats to refuse shipping accommodations". There is no mention of a dual-rate system based upon exclusive patronage contracts.

The recommendations of the Alexander Committee relating to carriers in foreign trade (*id.* at 415-421) concluded with seven numbered items. The first item stated a broad concept that ocean carriers should be brought under the supervision of an administrative agency as to their rates, agreements, and practices affecting the interests of shippers. The second item proposed that agreements with other carriers, with American shippers and railroad companies should be filed for approval and, to the extent that it related to inter-carrier agreements is a precursor of § 15. These two items bear out our contention that the entire legislation must be read as a broad grant of admin-

istrative discretion, specifically limited only by the exceptions clearly and expressly stated in the Act. From the standpoint of this litigation, however, the sixth recommendation is the most conclusive (*id.* at 421):

> "(6) That the use of 'fighting ships' and deferred rebates be prohibited in both the export and import trade of the United States. Moreover, all carriers should be prohibited from retaliating against any shipper by refusing space accommodations when such are available, or by resorting to other unfair methods of discrimination, because such shipper has patronized an independent line, or has filed a complaint charging unfair treatment, or for any other reason."

Here, as in § 14, Third, of the Shipping Act, the second sentence, which deals with retaliation, contains no mention of dual-rates or any other rates, and is equally silent regarding exclusive patronage contracts. The specific method of retaliation set forth is "refusing space accommodations when such are available," followed by the general language of "resorting to other unfair methods of discrimination."

We submit that the legislative history supports the statutory interpretation which we have urged in our FIRST POINT. It underscores the appropriateness of the application of the *ejusdem generis* doctrine in determining the scope to be given to the phrase "other discriminating or unfair methods," appearing in § 14, Third. So applied, the doctrine precludes application of the section to rates and contracts. The legislative history likewise demonstrates that when the Alexander Committee omitted to recommend and when Congress omitted to enact, specific prohibitions of dual-

rate systems, both had full knowledge of the existence of such systems; and, accordingly, the concurring opinion below erred in founding its conclusion upon the absence of such knowledge.

We submit that the Committee's action in omitting condemnation of the dual-rate system as such rested on recognized principles of shipping, to which we adverted at pp. 7-11, 29-30, *supra* (*id.* at 309, 310). Deprived of the only defense not specifically condemned by the Alexander Committee—the dual-rate system—a conference would have no alternative but to meet rate-cut with rate-cut with the inevitable result of a disastrous rate war and a dissolution of the conference itself.

The obviously conscious decision of the Alexander Committee to leave to the conferences the device of the dual-rate system, while proscribing deferred rebates, is undoubtedly to be explained upon the premise stated in the footnote to *Swayne & Hoyt, Ltd.*, 300 U. S. 297, 307 (1937), quoted *supra* at pp. 61-62.

The subsequent legislative history has been equally favorable to our position. Dual-rate systems have been openly and notoriously practiced by numerous conferences and repeatedly referred to in the Board's Annual Reports to Congress.[20] Congress has repeat-

[20] United States Maritime Commission, *Report to Congress for the Period of October 26 to December 31, 1936* (1937) 15; United States Maritime Commission, *Report to Congress For the Period Ended October 25, 1939* (1940) 24; United States Maritime Commission, *Report to Congress For the Fiscal Year Ended June 30, 1948* (1949) 25, 27; United States Maritime Commission, *Report to Congress For the Fiscal Year Ended June 30, 1949* (1950) 48, 53-54; *Annual Report of the Federal Maritime Board and Maritime Administration* (1950) 44, 49; *Annual Report of*

edly made thoroughgoing revisions of our shipping policy, e. g., The Merchant Marine Act, 1928, 45 Stat. 689, 46 U. S. C. § 891, *et seq.*; The Merchant Marine Act, 1936, 49 Stat. 1985, 46 U. S. C. § 1101; and numerous amendments in 1938 to the Merchant Marine Act, 1936 and the Shipping Act (Act of June 23, 1938, c. 600, 52 Stat. 953). Yet in none of these numerous revisions has Congress made any effort to interfere with the Board's action with respect to dual-rate systems.

In the final Report of the Senate Committee on Interstate and Foreign Commerce entitled, "*Merchant Marine Study and Investigation,*" 81st Cong., 2d Sess. (1950), the Committee emphasized that "as long as all shippers get the same privileges, large or small, and as long as all shipowners, large or small, may participate in a conference arrangement, such arrangements would appear to be in the public interest. The small export shipper has been vociferous in the defense of the contract rate system, as it has enabled him to get equal rate treatment and thereby compete successfully in world markets with the larger shippers" (p. 85). The Committee concluded that "from the standpoint of national security and from the point of view of the American shipper, the conference system has paid off in stability of rates and improved quality of service" (p. 86).

It follows that not only did Congress in 1916 omit any condemnation of the dual-rate system, but it has

the Federal Maritime Board, Maritime Administration (1951) 84; *Annual Report of the Federal Maritime Board, Maritime Administration* (1952) 39; *Annual Report of the Federal Maritime Board and Maritime Administration* (1953) 38-39, 41, 43-44; *Annual Report of the Federal Maritime Board and Maritime Administration* (1954) 31, 32, 34-36.

in the ensuing 40 years, with full knowledge of its use, refrained from interfering with the Board's administration of this conference instrumentality.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

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APPENDIX

Selected Provisions of the Shipping Act, 1916, as Amended.

SEC. 14. (46 U. S. C. § 812). That no common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

First. Pay, or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow, a deferred rebate to any shipper. The term "deferred rebate" in this Act means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term "fighting ship" in this Act means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade.

Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when

such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $25,000 for each offense.

SEC. 15 (46 U. S. C. § 814). That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings

between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of the Act approved July second, eighteen

hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", and amendments and acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", and amendments and acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

SEC. 16 (46 U. S. C. § 815). That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect what-

soever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this Act.

Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense.

SEC. 17 (46 U. S. C. § 816). That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or

collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

Every such carrier and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

SEC. 18 (46 U. S. C. § 817). That every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivering of property.

Every such carrier shall file with the board and keep open to public inspection, in the form and manner and within the time prescribed by the board, the maximum rates, fares, and charges for or in connection with transportation between points on its own route; and if a through route has been established, the maximum rates, fares, and charges for or in connection with transportation between points on its own

route and points on the route of any other carrier by water.

No such carrier, shall demand, charge, or collect a greater compensation for such transportation than the rates, fares, and charges filed in compliance with this section, except with the approval of the board and after ten days' public notice in the form and manner prescribed by the board, stating the increase proposed to be made; but the board for good cause shown may waive such notice.

Whenever the board finds that any rate, fare, charge, classification, tariff, regulation, or practice, demanded, charged, collected, or observed by such carriers is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice.

SEC. 19 (46 U. S. C. § 818). That whenever a common carrier by water in interstate commerce reduces its rates on the carriage of any species of freight to or from competitive points below a fair and remunerative basis with the intent of driving out or otherwise injuring a competitive carrier by water, it shall not increase such rates unless after hearing the board finds that such proposed increase rests upon changed conditions other than the elimination of said competition.

SEC. 22 (46 U. S. C. § 821). That any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water, or other person subject to this Act, and asking

reparation for the injury, if any, caused thereby. The board shall furnish a copy of the complaint to such carrier or other person, who shall within a reasonable time specified by the board satisfy the complaint or answer it in writing. If the complaint is not satisfied the board shall, except as otherwise provided in this Act, investigate it in such manner and by such means, and make such order as it deems proper. The board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

The board, upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this Act.

SEC. 23 (46 U. S. C. § 822). Orders of the board relating to any violation of this Act shall be made only after full hearing, and upon a sworn complaint or in proceedings instituted of its own motion.

All orders of the United States Maritime Commission, other than for the payment of money, made under this Act, as amended or supplemented, shall continue in force until its further order, or for a specified period of time, as shall be prescribed in the order, unless the same shall be suspended, or modified, or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.

SEC. 25 (46 U. S. C. § 824). That the board may reverse, suspend, or modify, upon such notice and

in such manner as it deems proper, any order made by it. Upon application of any party to a decision or order it may grant a rehearing of the same or any matter determined therein, but no such application for or allowance of a rehearing shall, except special order of the board, operate as a stay of such order.

SEC. 32 (46 U. S. C. § 831). That whoever violates any provision of this Act, except where a different penalty is provided, shall be guilty of a misdemeanor, punishable by fine not to exceed $5,000.

SEC. 36 (46 U. S. C. § 834). The Secretary of the Treasury is authorized to refuse a clearance to any vessel or other vehicle laden with merchandise destined for a foreign or domestic port whenever he shall have satisfactory reason to believe that the master, owner, or other officer of such vessel or other vehicle refuses or declines to accept or receive freight or cargo in good condition tendered for such port of destination or for some intermediate port of call, together with the proper freight or transportation charges therefor, by any citizen of the United States, unless the same is fully laden and has no space accommodations for the freight or cargo so tendered, due regard being had for the proper loading of such vessel or vehicle or unless such freight or cargo consists of merchandise for which such vessel or vehicle is not adaptable.

SUPREME COURT, U.S.

No. 74

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE, MITSUI STEAMSHIP CO., LTD., *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, ISBRANDTSEN COMPANY, INC., and EZRA TAFT BENSON, Secretary of Agriculture,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners,

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

Regretfully we conclude that it is necessary for us to reply to some matters contained in Respondents' briefs. Petitioner's reply brief in No. 73 has been served on us and we shall strive to avoid repetition.

Respondents' Statements of the Case

In their statements of the case, the United States and the Secretary of Agriculture (hereinafter re-

ferred to as the "Departments"), have adhered closely to the findings of the Board.[1]

On the other hand, Isbrandtsen Company, Inc. (hereinafter referred to as "Isbrandtsen"), although recognizing its stipulated obligation to be bound by the findings of the Board, has interlarded its statement with asserted facts which either were not found by the Board or are utterly inconsistent with the Board's findings. We could not, within proper limits, here call attention to each of these deviations from the Record. We think it sufficient to point to a few illustrations.

Isbrandtsen (Br. p. 23) cites page 20 of the Record for the statement that non-contract rates were *arbitrarily* fixed at a level 9½% higher than the contract rates. Neither page 20 nor any other page of the Record justifies this assertion. On the contrary, the Board (R. 32 to 34) found ample reasons why the spread is a reasonable one.

Isbrandtsen (Br. p. 25) asserts that the shipper's right to terminate his contract on three months' notice is of no value to him, as continuance under the contract for that period could possibly put him out of

[1] The lone exception is that the Departments (Br. p. 8) state that the Conference did not agree to respond in damages in the event of any inadequacy of service, citing R. 36. They apparently overlooked the following finding of the Board (R. 67):

> "* * * While there is no corresponding provision for liquidated damages to be paid in the event of carrier failure to provide adequate service, in our opinion, no such provision is necessary. The failure to specify the amount of damages in such circumstances is, in our view, nothing more than a recognition by the parties that damages may be readily ascertained, in the event of conference breach, on submission of the matter to arbitration, in accordance with article 10."

business. Isbrandtsen cites the Record, page 35, for this extraordinary statement. Neither that page nor any other page of the Record furnishes any support for the assertion.

Isbrandtsen (Br. p. 25, n. 14) states that under the shipper's contract as approved by the Board, the shipper would be precluded from using non-conference tonnage for the carriage of refrigerated cargo, even though refrigerated cargo had been excluded by the Board from the dual-rate system. The Board's order specifically excepted refrigerated cargo from the cargoes which the contract shipper is required to ship exclusively by Conference tonnage (R. 76).

Isbrandtsen (Br. pp. 29-32) asserts that it was excluded from the trade between the Philippines and the United States by virtue of the dual-rate system prevailing in that trade, or, at least, its cargoes transported in that trade were diminished by reason of that dual-rate system.[2] There is not a word in the Record which would indicate that Isbrandtsen's carryings from the Philippines were diminished by a dual-rate system or any cause other than Isbrandtsen's preference for the better-paying Japanese cargoes. The only finding on this subject is (R. 26):

> "* * * In allocating space as between Japanese and Philippine cargo, the higher rated Japanese cargo is given priority."

We believe that the foregoing illustrations amply demonstrate the unreliability of the factual assertions in Isbrandtsen's brief.

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[2] Founded upon this baseless assertion, Isbrandtsen states (Br. pp. 29-30, 76) that its experience in the Philippines proves that dual-rate systems lead to monopoly.

Respondents' Arguments

1. Relative to the Prime Purpose of the Shipping Act.

The Departments (Br. pp. 15-16, 18, 22, 24, 31, 45) predicate their argument upon the proposition that the chief purpose of the Shipping Act is to protect the non-conference carrier no matter how disruptive of the commerce of the United States its practices and activities may be. We believe that in our principal brief (pp. 28, 86-88) we have demonstrated that the prime purpose of the regulatory sections of the Act is to protect the commercial interests of our country against the disruptions of rate structures and service attendant upon rate competition in ocean transportation. Such disruption was regarded by the legislators as imposing a handicap upon our shipping interests and our merchants in their competition with their foreign counterparts. To avoid the disruptive effect of such competition, the Act envisaged a program of uniform and stable rate structures fixed by agreement among the carriers engaged in a particular trade under the scrutiny of a regulatory agency. It was recognized that such agreements might collide with the prohibitions of the antitrust laws. Accordingly, the statute (§15) contains a specific exemption of agreements approved by the Board from the provisions of the antitrust laws.

It is true that the Act shows the purpose of preventing certain practices, clearly and unmistakably described, which were found to permit a strong carrier or a group of carriers to throttle competition.

But it would pervert the purpose of the Act to suggest, as the Departments apparently do, that peripheral solicitude for non-conference competition outweighs the central objective of the Act—to realize for United States commerce the benefits of cooperative carrier rate-making in conference. To suggest that conferences have under the Act no lawful defense against rate competition which destroys this objective is to accuse Congress of nullifying its own purpose; for the consequence of the suggested reading of the statute would be to shield the non-conference competitor in practices that make impossible the maintenance of stable rates.

The argument of the Departments proceeds upon the assumption that the language of the Shipping Act must be read, wherever possible, in a way that will effectuate the policy embodied in *the antitrust laws*. We maintain that the language of the Shipping Act must be read in a way that will carry out the policies and objectives of *the Shipping Act*. This, we take it, is precisely what this Court held when it was confronted with an analogous problem in *F. C. C. v. RCA Communications, Inc.*, 346 U. S. 86 (1953).

This Court "has not held that competition is an absolute", nor that "competition is of itself a national policy" in those areas of economic activity, such as transportation, "where policy has shifted from one of prohibiting restraints on competition to one of providing relief from the rigors of competition, . . ." (*Ibid.* at 92). To provide relief from the rigors of competition in ocean shipping, the Shipping Act exempts from the antitrust laws all agreements which

are approved by the regulatory agency in accordance with the provisions of §15. While the policy in favor of competition was given weight by Congress when it prohibited the Board from approving certain conference practices, it is our contention that, if the objectives of the Act are considered, it can reasonably be concluded only that Congress could not have intended, by the language upon which respondents rest their case, to deprive the Board of discretion to approve a dual-rate system which it found was essential to the survival of the conference itself and which it found would leave the non-conference competitor with an equitable share of the total cargo.

Notwithstanding their devotion to the ideal of untrammeled competition, the Departments, like Isbrandtsen, charge the Conference with initiating a rate war (Depts. Br. pp. 29, n. 13, 50; Isbrandtsen Br. pp. 36, 154, n. 59). Ignoring the steady losses which Isbrandtsen's cut-rate competition had inflicted upon the Conference lines in the preceding years, while the Conference was maintaining stable rates, the Departments charge the Conference lines, as it were, with an act of aggression when they released the most important commodities from all restrictions upon freedom of competition. In view of the large increase of its service which Isbrandtsen was planning at the time, many of the Conference lines may well have disappeared from the trade, but for the opening of rates, before the Conference could complete the administrative and judicial procedures which it hoped would enable it to adopt the dual-rate system. In a realistic sense it was Isbrandtsen's rate cutting which

made open rate competition, and the consequent rate war, inevitable pending the institution of a dual-rate system.[3]

2. Respondents' Arguments Based Upon the Theory That the Dual-Rate System Necessarily Eliminates Non-Conference Competition Are Unfounded.

Although in their Statement of the Case the Departments adhere closely to the Record, once they plunge into their argument, the zeal of advocacy apparently erases recollection of the Board's findings in this case. Throughout the brief, arguments are predicated upon the assertion that "* * * the admitted purpose of the system is to force shippers into giving all of their business to the conference, thereby aiding the conference in obtaining a monopoly of the trade" (*e. g.*, Br. pp. 24, n. 10, 46-48).

[3] Isbrandtsen (Br. pp. 36-38) attacks the Board for failure to end the rate war. It states that the Board has repeatedly asserted a power to control rate action of conferences which it does not have with respect to the rate action of individual lines. Isbrandtsen chooses to disregard the nature of the problem with which the rate war confronted the Board. The Board's power over conference rate action arises from its power, under §15 of the Act, to cancel a conference agreement if action thereunder should "operate to the detriment of the commerce of the United States". Thus, if a conference fixes rates which are drastically high or drastically low, the Board may warn the conference that, in the absence of the proper rate adjustment, the conference agreement will be cancelled. The Board action in such case will be effective only if a conference fears cancellation of its agreement and the consequent rate competition among its members. But when a conference is compelled by the rate cutting practices of non-conference carriers to open rates on most commodities, the conference lines are already in competition among themselves to such an extent that the threat of dissolution of the conference will neither solve the problem which caused the conference to act as it did, nor will it be effective to influence conference action. It is significant that all the cases cited by Isbrandtsen (Br. p. 38) involve unduly high conference rates, except *Cargo to Adriatic*, which involved an unduly low conference rate on a single commodity. In any such case the threat of cancellation of the conference agreement would obviously confront the member lines with serious consequences.

Upon the assumption that the dual-rate system is coercive in effect and will produce a monopoly, the Departments erect substantially their entire argument for an interpretation of §14, Third, of the Shipping Act, outlawing the dual-rate system. Thus the Departments ignore the finding of the Board that the dual-rate system in the instant case will leave Isbrandtsen 10% or more of all the cargoes in the trade, which, the Board finds, is in excess of the percentage which the Conference lines will average and which constitutes an equitable share of the traffic (R. 62).

The Departments (Br. p. 46) and Isbrandtsen (Br. p. 78) would justify this disregard of the Board's findings on the basis of an incomplete quotation from the brief filed by the Board's counsel in *Isbrandtsen Co.* v. *United States*, 96 F. Supp. 883 (S. D. N. Y. 1951), affd. by an equally divided court *sub nom. A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Co., Inc.*, 342 U. S. 950 (1952).

They do not set forth a complete quotation of the relevant portion of the Board's brief in question. By asterisks they indicate the omission of the following sentence:

> "* * * The real question, as we see it, is whether the tendency toward monopoly which the system promotes (in a degree which varies from trade to trade) is legitimate. * * *" (Board's brief in 96 F. Supp. 883, pp. 3-4).

We submit that this is far from a concession that dual-rate systems inevitably produce monopoly. Rather, it leaves open for Board determination in each case (as was done in this case), in accordance

with *Swayne & Hoyt, Ltd.*, 300 U. S. at 304, (a) the degree of restriction imposed on non-conference competition, and (b) the value of the system in achieving and maintaining stability of rates and services, and (c) the weighing of these factors in the public interest.[4]

3. The Departments' Struggle With §14, Third.

a) Agreements Which May Be Approved Under §15.

The Departments (Br. pp. 45-46) base a considerable part of their reasoning upon the proposition that §15 of the Act does not contemplate the filing, and under certain conditions, the approval of agreements among carriers "controlling, regulating, preventing, or destroying competition" with other carriers who are not parties to the agreement. They assert that it is the statutory purpose to refer only to agreements having the above-quoted effects on competition *among the parties to the agreement.*

This position is demonstrably unsound. The section does not contain, either expressly or by implication, any such limitation. But there is much more to be said against any such restrictive construction.

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[4] Isbrandtsen (Br. pp. 49, 122) and the Departments (Br. p. 50) point to the number of conferences which do not maintain dual-rate systems as proof that all conferences can exist without such a system. The argument misses the mark. Our entire contention is that in some trades, dual-rate systems are necessary and in other trades they are not necessary, dependent upon competitive conditions and susceptibility of the trade to disruption by cutthroat competition. Our entire thesis is that it is for the Board to decide from case to case whether or not the conditions are such that a dual-rate system is indispensable.

The first paragraph of §15 is the publicity paragraph. The legislative history amply demonstrates that a major evil of pre-1916 agreements among carriers was that they were maintained in secrecy.[5] No one would assert, we are sure, that carriers might enter into agreements for the maintenance of a deferred rebate system and might legally conceal the existence of such agreements from the Board. Deferred rebate agreements must be filed, but they cannot be approved because they violate the Act (§14, First). The failure to require such filing would deprive the Board of the prime source of information on the basis of which to exercise its power, to which we shall now refer, to stop the performance of such illegal agreements. Yet there is no sort of agreement which would more completely destroy competition with an outside line.

The second paragraph of §15 gives the Board this power to disapprove and cancel agreements which it finds "to be in violation of this act." The section, therefore, clearly requires that agreements which violate the Act must be filed, if only to be stricken down and penalized in accordance with the final paragraph of §15. But the second paragraph also commands the Board to approve those agreements which are not violative of the Act, and which do not offend against the other criteria, *i. e.*, are not unduly or unreasonably discriminatory or detrimental to the commerce of the United States. There is no command to disapprove agreements restricting or de-

[5] We understand that an Appendix incorporating much of the Report of the Alexander Committee is being prepared by the Departments and the Board.

The Board has dealt with the legislative history in its Reply Brief in a manner which we thoroughly endorse. We, accordingly, do not deal specifically with legislative history in our Reply.

stroying competition between parties thereto and other carriers.

It will not do, therefore, to approach §14, Third, with a preconception that all agreements affecting competition with non-conference lines are beyond the pale of §15 even when such an agreement is specifically found by the Board to be in the interests of the commerce of the United States.

b) "Retaliation" as Dealt With in the Departments' Brief.

The Respondents have not dealt with or answered the argument in our principal brief (pp. 40-46), that prerequisite to a *per se* violation of §14, Third, there must be an administrative finding that the conduct under attack constitutes "retaliation." We pointed out that to the contrary, the Board had found that the dual-rate system had been adopted to enable the Conference lines to obtain needed cargo.[6]

In lieu of meeting this argument the Departments have taken a shifting position which discloses its untenability.

The Departments argue (Br. pp. 22-29) for a "realistic" interpretation of §14, Third. The Departments have not suggested any meaningful reading of the word "retaliate" in that section. To support their contentions they read the statute as if the word "retaliate" were not there at all and as if this subdivision prohibited carriers to:

"Third. Refuse, or threaten to refuse, space

[6] Strangely, the Departments state (Br. p. 40) that the distinction between the shippers' contracts before the Alexander Committee and the shippers' contracts in the instant case is that, in the former, the purpose of the conference was to acquire desirable business.

> accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason."

In this way, the Departments confirm what they set out to refute—that their reading of §14, Third, renders surplusage not only the word "retaliate" in §14, Third, itself, but also §14, First, §14, Fourth, §16, First, §16, Second and §17. The Departments make it clear that they regard any price differential as both discriminatory and retaliatory whenever it is made because the shipper has patronized any other carrier or has filed a complaint charging unfair treatment, *or for any other reason.* Sections 15, 16, First, and 17 prohibit "unjustly" discriminatory or unfair agreements and "undue or unreasonable" preference, advantage, prejudice or disadvantage and "unjustly" discriminatory or prejudicial rates, fares or charges. Each of these provisions patently contemplates that there may be lawful prejudices, disadvantages and discriminations where the discriminatory treatment is reasonable, just or due, *i. e., supported by reason.* To read §14, Third, as prohibiting discrimination "for any other *reason*" is to emasculate three sections of the statute. It is only by giving full effect to the word "retaliate" that substantial portions of the Act may be saved. The tortuous explanation attempted by the Departments (Br. p. 27) does not obviate the point which we have just made.

The Departments' argument has plausibility only if it is assumed that the basic issue in this case has already been decided in their favor, namely, whether the only kind of price differential which is neither

illegally *discriminatory nor retaliatory* is one based on differences in cost or value of service rendered to shippers. As we shall show below, "settled principles of transportation law" (Dept. Br. p. 28) do not answer this question in the way the Departments suppose.

The issue in this case is not disposed of by ignoring the Board's findings and substituting therefor words of evil connotation, *e. g.*, to describe the alleged effects of the dual-rate system as a "boycott" (Isb. Br. pp. 22, 65, 73, 150; Dept. Br. pp. 18, 21, 22, 28, 32-33, 39, 40) or a "monopoly of the trade" (Isb. Br. pp. 34, 62-63, 75-87, 158; Dept. Br. pp. 24, n. 10, 46-47); or to refer to the non-contract rates as "penal" and "penalty" rates (Isb. Br. pp. 65, 75, 150; Dept. Br. pp. 16, 18, 23, 24, 43, 45); or to refer to the liquidated damage provision of the shipper's contract as a "penalty" clause (Isb. Br. pp. 23, 65, 74, 103-4; Dept. Br. pp. 18, 44).

The Departments, to be sure, concede that "discrimination", when used without qualifying adjectives such as "unreasonable" or "unjust", is condemned by the statute only when the discrimination is used as a method of retaliation. They say (Br. p. 27): "Even a little retaliation, achieved by a discriminating or unfair method, is a dangerous and undesirable practice." But they do not suggest under what circumstances a discriminatory or unfair method can be said to achieve a "little retaliation". Again we must conclude that their answer would be, that there is retaliation whenever there is a discrimination "because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason." So, despite the concession that at

least a "little retaliation" is prerequisite to violation, the substance of the Departments' argument would deprive the word "retaliate" of any independent significance.

It cannot be over-emphasized that the word "retaliate" was the keystone of the majority opinion below.[7]

c) The Departments Have Not Overcome the Charge That Their Argument Renders §14, First, Surplusage.

The Departments (Br. p. 32) attempt to refute our contention that their interpretation of §14, Third, renders surplusage §14, First (the condemnation of deferred rebates), and §14, Second (the condemnation of fighting ships), by arguing that the word "other" in §14, Third, should be read as "other than deferred rebates and fighting ships as well as other than refusing or threatening to refuse space accommodations". But this reading would be plausible only if major surgery is used to rewrite §14 so that it consists of five sub-divisions instead of four, with the clause "resort to other discriminating or unfair methods, because etc." taken out of sub-division Third and made an independent sub-division. Since, however,

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[7] Isbrandtsen likewise vacillates between the idea that in order to found a charge of violating §14, Third, there must be retaliation as well as discrimination, and the idea that discrimination alone will do (Br. pp. 95, 98). At p. 95 Isbrandtsen speaks of congressional restraint "upon the common carrier from using retaliatory or discriminatory methods against a shipper 'for any other reason' * * *." Here Isbrandtsen takes the position that discriminatory action is illegal even if not retaliatory. But on the same page, and again on p. 98, Isbrandtsen says that discriminatory action is illegal only if it amounts to "retaliatory action or reprisals against a shipper because he had done something which he had a perfect right to do". In no place, however, does Isbrandtsen explain what, apart from the discrimination itself, makes the discriminatory action taken because the shipper "had done something which he had a perfect right to do", retaliatory.

the "resort" clause is part of sub-division Third and the specification of space accommodations does not exhaust the list of services with respect to which there can be retaliation, the clause, as a matter of language, can reasonably be read only as referring to methods similar to the refusal of space accommodations.[8]

We submit that the need for such major surgery demonstrates the forced nature of the Departments' construction and cannot, in any event, be performed in dealing with a penal statute.

d) The Deferred Rebate and the Dual-Rate System Are Significantly Different.

The illustration given by the Departments (Br. p. 44) omits the chief distinguishing characteristic of the deferred rebate.

A proper illustration would be as follows:

On, say, December 31, 1955, the conference circularizes shippers to the effect that if they will confine their shipments to conference vessels during 1956, the carriers will, on June 30, 1957, rebate 10% of freight paid during 1956, provided, also, the shipper has patronized conference vessels exclusively from January 1, 1957, to June 30, 1957. Again, say, on December 31, 1956, the conference circularizes shippers similarly

[8] We stated in our principal brief (pp. 37-38) that the Court could find illustrations of refusals of common carrier facilities by reference to the types enumerated in §14, Fourth. The Departments erroneously assumed that the types which we referred to in our brief as merely illustrative, were exclusive (Dept. Br. p. 30). The Court will find in *United States* v. *Alaska S. S. Co.*, 110 F. Supp. 104 (W. D. Wash. 1952), a handsome catalogue of types of physical facilities, denial of which comes within our concept of the true definition of "other discriminating or unfair methods" as used in §14, Third.

with respect to the year 1957 and the first six months of 1958, and so on year by year. Let us examine the effect of this arrangement on shippers.

Shipper "A" does not patronize any carrier other than conference lines, and on June 30, 1957, and on June 30, 1958, receives rebates of 10% of freight paid during 1956 and 1957 respectively. Shipper "B" patronizes the conference lines exclusively during 1956, and during the first four months of 1957. During 1956, he pays conference lines freight aggregating $50,000. During the first four months of 1957, he pays conference lines freight totalling $15,000. At the end of the fourth month of 1957, he desires to avail himself of a non-conference shipping opportunity. What sacrifice must he make in order to avail himself of this opportunity?

If "B" ships by the non-conference lines before June 30, 1957, he will lose the $5,000 rebate earned on shipments made during 1956, plus the $1,500 rebate earned on shipments made during 1957, as well as 10% of any additional freight which he may pay to conference carriers before December 31, 1957. If he decides to patronize conference lines exclusively up to June 30, 1957, in order to save the $5,000 rebate earned on his 1956 shipments, the conference lines will be accumulating in their pockets 10% rebate on each additional shipment made during 1957, which, however, he will sacrifice if, after June 30, 1957, and at any time before July 1, 1958, he decides to patronize the non-conference lines. Thus, he is compelled from year to year to continue under the deferred rebate system, on pain of losing 10% of all freight which he may have paid during a period of up to eighteen months.

This result is to be contrasted with the position of a contract shipper under the dual-rate system. At no time do the conference lines accumulate in their pockets any of his funds; and he can, at any time, without loss of a penny to himself, terminate his arrangement on three months' notice. Of course, he will be entitled to the contract rates during the notice period.

e) The Construction for Which We Contend Leaves No Room for Evasion.

Departments argue (Br. pp. 23-24) that the Board's construction would enable a carrier to evade the purposes of the Act. They argue that consistently with that interpretation a carrier could retaliate against a shipper by refusing him space accommodations because he had refused to contract to ship exclusively by conference vessels.

First, we consider our prime contention that the words "other discriminating or unfair methods" in §14, Third, do not apply to contracts and rates. There is no inconsistency between this position and a concession that the section condemns retaliation by refusal of shipping space because the shipper will not become a contract shipper.

Secondly, we consider our position that even if the words "resort to other discriminating or unfair methods" should be read to apply to contracts and rates, the dual-rate system still would not constitute a violation *per se* of §14, Third. Under this interpretation again the supposed evasion would not be possible. Although a denial of space *when in retaliation* for

refusal to become a contract shipper would violate §14, Third, still the charge of a lower rate to the contract shipper than to a non-contract shipper would not *per se* constitute a violation; it would merely be the granting of a consideration for which the shipper bargained. It could become a violation only if the Board should find as a fact that the higher rate charged to the non-contract shipper was actually retaliatory in purpose rather than a rate reasonably arrived at for the legitimate purpose of obtaining cargoes.

4. The Authority of *U. S. Navigation Co.* and *Far East Conference* on the Question of Illegality *Per Se* Has Not Been Impeached.

Respondents have sought to dismiss *United States Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474 (1932), and *Far East Conference* v. *United States*, 342 U.S. 570 (1952), as mere primary jurisdiction cases which did not determine the question of illegality *per se* of the dual-rate systems there under attack.

Respondent's argument in this regard ignores the nature of the contentions pressed upon the Court in those cases and the significance of the primary jurisdiction rule. In both cases the complainants contended that the Board could not approve the respondents' practices because the dual-rate system is illegal *per se* under the Shipping Act. Therefore, they argued, there would be no point in ceding primary jurisdiction to the Board since, the dual-rate system being illegal *per se*, no facts or attending circumstances found by the Board could render it legal.[9]

[9] This argument was adopted in the dissenting opinion in *Far East Conference*, 342 U.S. 570, 578-579.

The touchstone to the correct interpretation of *U. S. Navigation Co., Far East Conference*, and the lower court decisions applying those cases is *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285 (1922). The rule there laid down was that where only a pure question of law is involved, the reference of the case to an administrative agency is not required; but that in all cases where an expert analysis of technical facts and of attending historical, competitive, and other business circumstances is required for the resolution of the legal issues, there must be a reference to the body specifically created to perform that function. This principle was at the foundation of the decision in *U. S. Navigation Co.* (284 U. S. at 481-482). Accordingly, the disposition of that case by dismissal of the judicial proceedings in deference to primary administrative jurisdiction, can only signify that there was not a pure question of law—*i. e.*, the dual-rate system was not illegal *per se*—and the issues required resolution on an expert evaluation of technical information. This doctrine directly applied to the Shipping Act was followed without qualification in *Far East Conference*. The lower court cases, *Wisconsin & Michigan Transportation Co.* v. *Pere Marquette Line Steamers*, 67 F. 2d 937 (C. C. A. 7th 1933), and *United States* v. *Alaska S.S. Co.*, 110 F. Supp. 104 (W. D. Wash. 1952) (cited Isbr. Br. pp. 137-138), which applied the rulings of this Court with respect to primary jurisdiction under the Shipping Act, must also be explained on the ground that in those cases the courts were of opinion that the facts alleged in the respective complaints and indictments did not as a matter of law constitute violations of the Shipping Act, but required an examination by the Board of the surrounding facts and circumstances and an applica-

tion to those facts and circumstances of its expert judgment.

Wisconsin & Michigan Transportation appears to have been decided on the ground that the charge that defendant was using a "fighting ship" was a mere allegation of a legal conclusion; and that the allegations that the defendant was charging unreasonably low rates and that it was doing so for the purpose of ruining the plaintiff's business and that these facts made out a case of "fighting ship" involved determinations clearly beyond the court's functions. The issues thus presented could not be resolved without an examination of all facts and circumstances. A mere inspection of §14, Second, indicates that expertise is required in determining whether a "vessel [is being] used in a particular trade * * * for the purpose of excluding, preventing or reducing competition by driving another carrier out of said trade." Similarly, when a violation of §14, Third, is charged, it is for the Board to determine whether or not there has been retaliation and whether or not there has been "resort to other discriminating or unfair methods."

In *Alaska S.S. Co.* the complaint and indictment were drawn under the Sherman Act and contained no words of art under the Shipping Act. Some of the acts alleged might have been held by the Board to constitute violations of the Shipping Act and others might have been so interrelated with such acts as to require administrative adjudication. *Alaska S.S. Co.* appears to be entirely consistent with *Great Northern Ry. Co.* and with the interpretation of *U. S. Navigation Co.* set forth in our principal brief.

That this Court in *U.S. Navigation Co.* did reject the doctrine of illegality *per se* is further emphasized by the following consideration. There the plaintiff argued that the Board in *Eden Mining Co.* v. *Bluefields Fruit & S.S. Co.*, 1 U.S.S.B. 41 (1922), had already ruled that a dual-rate system was illegal and therefore the Court should not insist on a further consideration by the Board of that question. This Court rejected the argument and in this particular stated (284 U.S. at 488):

> "* * * To hold otherwise would be to create the doubtful, and perhaps dangerous, precedent that a decision of the Board in respect of one agreement definitely establishes that the rule of that decision must, without more, be applied to all other agreements alleged to be of a similar character, although it may turn out, upon investigation, that the allegations are not warranted, *or the facts and circumstances of and surrounding the transaction are so wholly different as to afford ground for a different result.*" (Italics supplied.)

This language would appear to dispose of Respondents' contention that this Court did not consider the legality of dual-rate systems to depend upon the facts and attending circumstances.

The Departments (Br. p. 59) cite *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752 (1947). There the plaintiff had not completed the procedure specified by the statute for renegotiation of contracts, but attempted to obtain an injunction against further administrative proceedings on the ground that the statute was unconstitutional. The case was therefore clearly one which involved the principle of the exhaustion of administrative remedies and not one involving the principle of primary jurisdiction. The distinction has

recently been sharpened by this Court in *United States* v. *Western Pacific R. Co.*, 352 U. S. 59, 63-64 (1956).

5. The Proposed Dual-Rate System Is Not Unlawful Under §§15, 16 and 17 of the Shipping Act.

Isbrandtsen contends (Br. pp. 147-155) that the judgment below could be supported on the theory that the proposed dual-rate system is unduly prejudicial and unjustly discriminatory in violation of §§15, 16 and 17 of the Shipping Act. The argument seems to be that, on principles conjured out of cases decided under the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. §1, *et seq.*, the dual-rate system is *per se* illegal under the enumerated sections of the Shipping Act. We would have thought that if anything had been made clear by *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 303-304 (1937), it was that a dual-rate system is only *prima facie* discriminatory and that its lawfulness depends on the Board's finding whether the discrimination is undue or unreasonable. Isbrandtsen has cited *Wight* v. *United States*, 167 U. S. 512 (1897); *Louisville & Nashville Railroad Co.* v. *Mottley*, 219 U. S. 467 (1911); *Chicago, Ind. and L. Ry. Co.* v. *United States*, 219 U. S. 486 (1911); *I. C. C.* v. *Delaware, L. & W. Railroad*, 220 U. S. 235 (1911); *I. C. C.* v. *B. & O. Railroad*, 225 U. S. 326 (1912); *Fourche R. R. Co.* v. *Bryant Lumber Co.*, 230 U. S. 316 (1913); and *Seaboard Air Line Ry. Co.* v. *United States*, 254 U. S. 57 (1920), for the proposition that, as a matter of law, dual-rate systems are unlawful, since they involve the charging of different rates to different shippers for the same service, and that, therefore, there can be no justification of the discrimination. The Departments, in

support of their argument that there can be no justification of a discrimination under §14, Third, rely on the same proposition as embodying "settled principles of transportation law". These cases rest on §2 of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. §2, a provision which has no counterpart in the Shipping Act, and, accordingly, such authorities are inapplicable. Section 2 of the Interstate Commerce Act contains an absolute prohibition of the charge of different rates to different shippers similarly situated, and constitutes any such charge *per se* unjust discrimination. The legislative history abundantly demonstrates that the framers of the Shipping Act consciously omitted any such provision as being inappropriate to ocean transportation. In §17 Congress prohibited unjust discrimination and unjust prejudice, but confided to the Board the determination in its sound discretion whether discriminations and prejudices are unjust, without placing upon the Board the statutory straight-jacket in which §2 of the Interstate Commerce Act encases the Interstate Commerce Commission.

Under the Interstate Commerce Act, however, it is not true that the Commission cannot validate differences in charges to different shippers of the same commodity between the same termini when competitive forces render a difference in rates justifiable.

In *Eastern-Central Association* v. *United States*, 321 U. S. 194 (1944), it appeared that a truckload consisted of 20,000 pounds. An economy was effected in carrying a truckload as against less than a truckload. On the other hand, a railroad carload consisted of 30,000 pounds or, in other words, a truckload plus

a half truckload. Motor carriers proposed three levels of rates—the highest for less than a truckload, the median for a truckload, and the lowest for 30,000 pounds, or a truckload plus a half truckload. This lowest rate was predicated exclusively on the competition between trucks and railroads. It could not be justified on the basis of a cost saving. The Interstate Commerce Commission, adhering to a previously announced policy that volume differentials would not be approved unless based on a cost saving, refused to consider rail competition as a justification for the 30,000 pound differential. In disapproving the Commission's refusal to consider carrier competition as a factor justifying a rate differential, this Court said (321 U. S. at 207-208):

> "* * * The junction of difference in available units, with rates geared to them, *and the fact of competition or competitive possibility produces or may produce consequences neither the character of the unit nor the fact of competition, nor both together, could create in either form of service taken alone.* In short, the very fact a rail carload is 30,000 pounds and a truckload 20,000, with rates respectively tied to these weights, may make a life-or-death difference in the competitive struggle, with consequences affecting not only the carriers but the public interest as well. And appellants' argument that a 30,000-pound minimum is *necessary to meet rail competition* is at least consonant with the frequent recognition, both by the Commission and by this Court, that there are occasions when it is appropriate for the former to consider *a carrier's need to meet other carriers' competition* as a factor justifying what otherwise would be an unreasonable or an unduly discriminatory rate." (Italics supplied.)

Competition has also been held to justify the charging of a lower rate for rail transportation of imported goods from a point on one seaboard to a point on another than is charged for identical goods of domestic origin, where the imported goods are susceptible of through transportation by water to the ultimate destination at a lower total cost than the sum of the water transportation plus local rail freight. *Texas & Pacific Ry.* v. *I.C.C.*, 162 U.S. 197, 233-4 (1896). We also refer to *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 165-7 (1897), where carrier competition was held to justify the charging of a lower rate for a longer than for a shorter haul of identical goods, and this Court distinguished *Wight* v. *U.S.*, *supra*, decided under §2 of the Interstate Commerce Act, and cited by Isbrandtsen.

Finally, and we believe most important, in *Swayne & Hoyt, Ltd.*, *supra*, this Court pointed out exactly how ocean carrier competition may justify a *prima facie* discrimination in ocean rates.

CONCLUSION

For the foregoing reasons, as well as for the reasons advanced in our principal brief, we respectfully submit that the judgment below should be reversed.

Respectfully submitted,

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